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Third report on State responsibility

by Mr. James Crawford, Special Rapporteur

Addendum

CONTENTS

		Paragraphs	Page
II.	Part Two. Legal consequences of an internationally wrongful act of a State (continued)		
B.	Chapter II. The forms of reparation		
1.	General considerations	120 - 123	3
2.	Restitution	124 - 146	4
(a)	Existing article 43	124 - 129	4
(b)	Cessation, restitution and compensation: questions of classification and priority	130 - 143	10
(c)	Exceptions to restitution	144	16
(d)	The formulation of article 43	145 - 146	18

CONTENTS (continued)

		Paragraphs	Page
3.	Compensation	147 - 166	18
	(a) Existing article 44	147 - 153	18
	(b) Assessment of compensation: general principle or detailed criteria?	154 - 160	22
	(c) Limitations on compensation	161 - 164	29
	(d) Conclusion	165 - 166	30
4.	Satisfaction	167 - 194	31
	(a) Existing article 45	167 - 177	31
	(b) The character of satisfaction as a remedy	178 - 181	35
	(c) Specific forms of satisfaction	182 - 192	36
	(d) Limitations upon satisfaction: article 45 (3)	193	41
	(e) Conclusion on article 45	194	41
5.	Interest	195 - 214	42
	(a) The question of interest in the draft articles	195 - 198	42
	(b) The role of interest in relation to reparation	199 - 212	44
	(c) A provision on interest?	213 - 214	51
6.	Mitigation of responsibility	215 - 222	51
	(a) Contributory fault	216 - 221	52
	(b) Mitigation of damage	222	54
7.	Summary of conclusions as to Part 2, Chapter II	223	54

II. Part Two. Legal consequences of an internationally wrongful act of a State (continued)*

B. Chapter II. The forms of reparation

1. General considerations

120. Chapter II is presently entitled "Rights of the Injured State and Obligations of the State which has committed an Internationally Wrongful Act". A shorter and simpler title would be "The Forms of Reparation". This has several other advantages. It avoids the implication that the rights of "injured States" are in all cases the strict correlative of the obligations of the responsible State.[212] It is also consistent with the view that the responsible State has (apart from cessation) a single general obligation consequent upon the commission of an internationally wrongful act - that is, to make full reparation. The forms which reparation will take depend on the circumstances, and these are dealt with successively in Chapter II, and in the proposed Part 2 bis, dealing with the implementation of responsibility.

121. Chapter II as adopted on first reading identified two general principles (cessation and reparation) which it is now proposed be included as such in Chapter I, and four forms of reparation, viz., restitution, compensation, satisfaction and assurances and guarantees against repetition (regarded however as *sui generis*). For reasons already given, it is better to treat assurances and guarantees as an aspect of cessation and future performance, since like cessation but unlike reparation they assume the continuation of the legal relationship breached.[213] That leaves three major forms of reparation. Special Rapporteur Arangio-Ruiz had also proposed a separate article dealing with interest; this was subsumed by the Commission in a fleeting reference in article 44 (compensation). In addition, Chapter II should deal with the question of contributory fault, previously included in article 42 (2).[214]

122. Apart from the general remark that Part 2 should be reorganized "in order to take into account the choices made in Part One",[215] there have not been specific comments by Governments on the conception and structure of Part 2.

123. Having regard to the provisions proposed to be transferred to Chapter I of Part II, it seems that Chapter II could therefore consist of provisions dealing with the following issues:

- restitution in kind (existing article 43);

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* The Special Rapporteur wishes to thank Pierre Bodeau, Jacqueline Peel, John Barker and Petros Mavroidis for their assistance in the preparation of this Report.

[212] See above, para. 84.

[213] See above, para. 54.

[214] See above, paras. 19 and 33.

[215] A/CN.4/496, p. 15, para. 108.

- compensation (existing article 44);

- satisfaction (existing article 45);

- interest (referred to in article 44, but no actual article);

- mitigation of responsibility (present article 42 (2)).

A number of additional questions arise. These include, for example, the choice of modes of reparation by a victim/injured State, the effect of settlement of a claim of responsibility, and a possible rule against double recovery. These will be discussed in the context of the proposed Part Two bis on the implementation of responsibility.

2. Restitution

(a) Existing article 43

124. Article 43 provides:

"Restitution in kind

The injured State is entitled to obtain from the State which has committed an internationally wrongful act restitution in kind, that is, the re-establishment of the situation which existed before the wrongful act was committed, provided and to the extent that restitution in kind:

(a) is not materially impossible;

(b) would not involve a breach of an obligation arising from a peremptory norm of general international law;

(c) would not involve a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation; or

(d) would not seriously jeopardize the political independence or economic stability of the State which has committed the internationally wrongful act, whereas the injured State would not be similarly affected if it did not obtain restitution in kind."

Chapter II proceeds on the assumption that restitution in kind (hereafter referred to simply as restitution) is the primary form of reparation. Article 43 defines restitution rather broadly as "the re-establishment of the situation which existed before the wrongful act was committed", and goes on to spell out four exceptional cases where restitution is not required. It is not stated in so many words, but the intention was to allow the injured State to elect to receive compensation or satisfaction rather than restitution: this is achieved by expressing restitution as a right or entitlement of the injured State. However this fails to deal with the problem of a plurality of

injured States, or with the (admittedly rare) case where the injured State does not have such an option. This might be so, for example, in situations involving detention of persons or unlawful seizure of territory.

125. The commentary to article 43 describes restitution as "the first of the methods of reparation available to a State injured by an internationally wrongful act".[216] It notes that the term "restitution" is sometimes used to mean, in effect, full reparation, but prefers the narrower and more orthodox meaning of "the establishment or re-establishment of the situation that would exist, or would have existed if the wrongful act had not been committed". Thus in order to achieve restitution one has only to ask a factual question - what was the *status quo ante*? - and not the more abstract or theoretical question - what would the situation have been if the wrongful act had not been committed?[217]

126. The commentary goes on to affirm in strong terms the "logical and temporal primacy of restitution in kind" over reparation by equivalent, i.e. compensation. At the same time it notes that the injured State will frequently elect to receive compensation rather than restitution, and that compensation is in fact "the most frequent form of reparation". This flexibility in practice must be acknowledged, but it also has to be reconciled with the affirmation that restitution is the primary form of reparation.[218] According to the commentary, the principal vehicle for achieving such a reconciliation appears to be by the injured State seeking or accepting compensation rather than restitution.[219] The commentary does not, however, discuss what the situation would be if there were several injured States which disagreed about whether to insist on restitution. Nor does it explicitly provide for any choice; this is done implicitly by treating restitution as a right of the injured State, which it may or may not invoke. But (quite apart from the problems associated with a plurality of injured States) there may be situations where the injured State is not entitled to waive restitution. For example the Government of a State invaded and annexed contrary to the rules relating to the use of force would hardly be entitled to accept compensation rather than the withdrawal of the occupying forces, and similar considerations would apply where the internationally wrongful act took the form of the forcible detention of persons. It may be that on a proper analysis such situations do not involve restitution in the strict sense so much as cessation of a continuing wrongful act, and that the particular emphasis on "restitution" in such cases arises from the law of performance rather than the law of reparation. It seems clear that non-performance cannot be excused in cases where a continuing wrongful act is a breach of a peremptory norm of general international law (e.g. in the case of the unlawful occupation of a State). The same would apply in case of a continuing breach of a non-derogable human rights obligation (e.g. as between States parties to a human rights treaty). But the implications of these limits for restitution in the proper sense of the term have not been explored, in the commentary or for that matter in the literature.

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[216] Commentary to article 43, para. (1), text in *Yearbook ... 1993*, vol. II (Part Two), pp. 61-67.

[217] *Ibid.*, para. (2).

[218] *Ibid.*, para. (3).

[219] *Ibid.*, para. (4).

127. The commentary does discuss a different issue, viz. the distinction sometimes drawn between material restitution (e.g. the return of persons, property or territory) and juridical restitution (e.g. the annulment of laws). There are many examples in State practice of both kinds. Iraq's withdrawal from Kuwait following the invasion of 1990 is an example of partial material restitution, but it was also accompanied by forms of legal restitution, including the annulment of the Iraqi decree proclaiming Kuwait a province of Iraq. Combined forms of restitution may also be negotiated on a without prejudice basis as part of the settlement of a dispute, without any admission of responsibility: for example the dispute concerning the seizure by Canada of the Spanish fishing vessel, the *Estai*, led to a complex settlement.[220] Given the tendency for different types of measure (legal and factual) to be combined in restitution, the commentary concludes that there is no need for a formal distinction between "material" and "juridical" restitution to be made in the article itself.[221] Nor is it necessary for the article to deal explicitly with the question of restitution made on the international legal plane, e.g. by the annulment of an international claim to jurisdiction or territory. In the context of dispute settlement, such measures may well be achieved by the grant of a declaration as to the true legal position, even if this is formally binding only on the parties to the proceedings. Despite the terms of article 59 of the Statute of the International Court of Justice, the practical effect of such a declaration may well be to establish the sovereignty of the State concerned over its territory, or its jurisdiction over maritime resources, on a more general basis.[222] Such a legal status is sometimes said to be "opposable *erga omnes*", but this is not to be confused with the question of obligations *erga omnes*, as discussed earlier in this Report.[223] The commentary concludes that ...

> "all that international law - and international bodies - are normally fit or enabled to do with regard to internal legal acts, provisions or situations is to declare them to be in violation of international obligations and as such sources of international responsibility and further to declare the duty of reparation, such reparation requiring, as the case may be, invalidation or annulment of internal legal acts on the part of the author State itself. As regards the question whether it is possible for an international tribunal to directly annul international legal rules, acts, transactions or situations, for the purpose of reparation in the form of restitution in kind, the Commission is inclined to answer it in the affirmative but observes that since the

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[220] See *Fisheries Jurisdiction case (Spain v. Canada)*, judgment of 4 December 1998, para. 21. The settlement between Canada and the EU provided, inter alia, for the release of the vessel and its master, the return of the bond, and the repeal of the Canadian regulations applying to EC ships fishing for Greenland halibut in the NAFO regulatory area. In addition the parties agreed on the provisional application of new conservation and enforcement measures. Evidently the arrangements between Canada and the European Union in that case did not fully resolve the dispute: Spain continued the proceedings it had commenced before the International Court, which held however that it lacked jurisdiction over them.

[221] Commentary to article 43, paras. (7)-(8).

[222] As, e.g., in the *Eastern Greenland* case, *PCIJ*, Ser. A/B, No. 53 (1933).

[223] See above, paras. 97, 106.

effects of decisions of international tribunals are normally confined to the parties, any act or situation the effects of which extend beyond the bilateral relations between the parties could not be modified or annulled except by the States themselves, unless the relevant instruments provided otherwise."[224]

128. The commentary goes on to discuss and justify the four exceptions to restitution provided for in article 43 as adopted on first reading:

(a) As to impossibility of restitution, this may be total or partial, and "derives from the fact that the nature of the event and of its injurious effects have rendered restitutio physically impossible. Such may be the case either because the object to be restored has perished, because it has irremediably deteriorated or because the relevant state of affairs has undergone a factual alteration rendering physical restitutio impossible".[225]

(b) The second "exception" relates to hypothetical situations where restitution would involve a breach of a peremptory norm of general international law, although no example of such a situation is offered (or can readily be conceived). The commentary limits such cases of "legal impossibility" to breaches of peremptory norms, where the resulting legal situation will evidently concern all States and not only those immediately involved. It distinguishes cases where restitution may affect the rights of third States: "if the State which should provide restitutio could only do so by infringing one of its international obligations towards a 'third' State, this does not really affect the responsibility relationship between the wrongdoing State and the injured State entitled to claim restitutio to the injured State on the one hand and the 'third' State on the other hand".[226] This is of course true: State A may be responsible to State B for action taken in conjunction with State C, even if the action takes the form of the conclusion of a bilateral treaty. But the issue is not responsibility, it is the form that reparation should take, and the completion of a legal act by the responsible State may make it impossible for that State to provide restitution. It may be that such cases are better subsumed under the rubric of impossibility. For example in *El Salvador v. Nicaragua*, the conclusion of a treaty between Nicaragua and a third State (the United States) was held by the Inter-American Court of Justice to be a breach by Nicaragua of a prior treaty commitment by Nicaragua to El Salvador. Assuming the validity of the later agreement, its termination was not something which lay exclusively within the power of Nicaragua. In the event the Inter-American Court declined to pronounce on the validity of the later treaty, and confined itself to giving declaratory relief.[227] The commentary goes on to point out that a State cannot properly resist the giving of restitution by appealing to the concept of domestic jurisdiction:[228] this seems self-evident, since if

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[224] Commentary to article 43, para. (10).

[225] *Ibid.*, para. (11).

[226] *Ibid.*, para. (12).

[227] (1917) 11 *AJIL (Supplement)* p. 3.

[228] Commentary to article 43, para. (13).

restitution is required by international law in some respect, the matter in question ceases, by definition, to fall exclusively within the domestic jurisdiction of the responsible State.[229]

(c) The third exception concerns cases where to insist on restitution as distinct from compensation would be disproportionate in the circumstances. According to the commentary, this exception is "based on equity and reasonableness and seeks to achieve an equitable balance between the onus to be sustained by the author State in order to provide restitution in kind and the benefit which the injured State would gain from obtaining reparation in that specific form rather than compensation".[230] In support the commentary cites the *Forests of Central Rhodopia* case, but this is, again, more a case of impossibility or impracticality than excessive burden,[231] and anyway does not seem to have been a case of manifest disproportionality. So far as paragraph (c) is concerned, however, the commentary goes on to insist that only "a grave disproportionality between the burden which this mode of reparation would impose on [the responsible] State and the benefit which the injured State would derive therefrom" can justify a refusal to make restitution.[232]

(d) The fourth exception to restitution involves another "catastrophic" scenario, not unlike the contingency, envisaged in article 42 (3) as adopted on first reading, that full reparation may deprive a people of its own means of subsistence.[233] According to article 43 (d) and its commentary, the responsible State need not make restitution if that would "seriously jeopardize its political independence and economic stability whereas failure to obtain restitution in kind would not have a comparable impact on the injured State". Again no actual examples are cited: the case envisaged is said to be "very exceptional ... and may be of more retrospective than

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[229] But quite apart from considerations of domestic jurisdiction, there may be cases where the interests of legal security or the rights of third parties make restitution effectively impossible. For example the grant of a government contract to company A, in breach of international rules on public procurement, may nonetheless be legally effective to create contractual rights for company A. In such cases restitution (in the sense of the regranting of the contract) may be excluded.

[230] Commentary to article 43, para. (14).

[231] *UNRIAA.*, vol. III, p. 1405 (29 March 1933), cited in the commentary to article 43, para. (15). The arbitrator in that case cited a number of reasons for the conclusion that compensation was the only practical form of reparation: the fact that the claimant was not solely entitled to engage in forestry operations, but that no claims had been brought by the other persons associated with it in the operation, the fact that the forests were not in the same condition as at the time of taking, and the difficulty of determining whether restitution would actually prove possible without detailed inquiry into their present condition, as well as the fact that restitution might affect the rights of third persons granted since the taking. *Ibid.*, at p. 1432. The case supports a broad understanding of the "impossibility" of granting restitution.

[232] Commentary to article 43, para. (16).

[233] See above, paras. 38-42.

current relevance".[234] The commentary goes on to discuss issues of compensation for land nationalization programmes, noting that general nationalization for a public purpose and on a non-discriminatory basis is lawful, and that the question of compensation for nationalization is governed by the relevant primary rule: correspondingly, in those cases where the failure to pay compensation was an internationally wrongful act, reparation for such failure would involve the payment of money, including interest, and not the return of the property in question.[235]

129. Government comments on article 43 express doubts as to some of the exceptions it provides but do not question its general appropriateness. Although it emphasizes the "priority of compensation over restitution in practice", the United States acknowledges that "restitution in kind has long been an important remedy in international law and plays a singular role in the cases where a wrongdoing State has illegally seized territory or historically or culturally valuable property".[236] France proposes to substitute the phrase "re-establishment of the pre-existing situation" for "restitution in kind", on the ground that the latter might suggest "simple restitution of an object or a person".[237] In common with other Governments, it challenges some of the exceptions stated in subparagraphs (a) to (d), which in its view could undermine the weight of the general principle reflected in the *chapeau*, and unduly favour the responsible State. Consistently with its earlier objections to the concept of *jus cogens*, the French Government considers that subparagraph (b) should be deleted; moreover it is in its view difficult to "understand how the restoration of lawfulness could be contrary" to a peremptory norm.[238] Subparagraph (c) has also been criticized by the United States as enabling the responsible State to avoid restitution when it would be appropriate or preferred; accordingly, that Government calls for a clarification of the phrase "a burden out of all proportion".[239] But its main concerns relate to subparagraph (d): this should in its view be deleted. Even though it accepts that that provision "may have relatively limited practical effect given the priority of compensation over restitution in practice", the United States opposes the inclusion of broad concepts "left undefined and without an established basis in international practice", and which are "likely to have effects

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[234] Commentary to article 43, para. (17).

[235] In recent years, policy reversals in respect of earlier land nationalization programmes and the trend towards privatization have led to measures of restitution of land and other property to their former owners in a number of countries. These programmes have their own specific features and do not, for the most part, involve restitution in the sense of article 43.

[236] A/CN.4/488, pp. 106-107.

[237] *Ibid.*, p. 106; the same modification should be applied to article 44, para. 1 (*ibid.*, p. 108). For Uzbekistan, an addition should be made to the *chapeau* of the article, providing in substance that, "if restitution of objects having individual characteristics is not possible, objects of the same kind or nearly identical objects may, by agreement, be substituted for them" (*ibid.*, p. 107).

[238] *Ibid.*, p. 106.

[239] *Ibid.*, p. 107. By contrast, France seems implicitly to support that provision (*ibid.*, p. 106).

beyond the narrow provision of article 43".[240] Japan considers that the words "seriously jeopardize ... the economic stability" should be clarified, in order to pre-empt abuses by the wrongdoing State: the deletion of the paragraph, however, would be a solution of last resort as there is, in its view, a need for such a provision in the draft articles.[241]

(b) Cessation, restitution and compensation: questions of classification and priority

130. That restitution is recognized as a principal form of reparation in international law cannot be doubted, and certainly no Government has questioned it. A more difficult issue concerns the relations between, on the one hand, cessation and restitution, and on the other, restitution and compensation. The distinction between cessation and restitution involves more a question of a distinction in principle: as has been seen, cessation may give rise to a continuing and (in some cases) non-derogable obligation, even when return to the *status quo ante* is hardly possible. As to the relation between restitution and compensation, the distinction between them is clear enough: restitution involves a return to the *status quo ante*, i.e. a form of restitution *in specie*, whereas compensation is the provision of money or other value as a substitute for restitution. The problem here is rather whether it is possible to maintain a principle of the priority of restitution, in the face of the general predominance of compensation in the practice of States and of tribunals. The two questions need to be dealt with separately.

Cessation and restitution

131. The question of cessation - which may be described as the restitution of performance - has already been discussed.[242] For the reasons given, cessation should be considered alongside reparation as one of the two general consequences of the commission of an internationally wrongful act. But the distinction between them is not always clear.

132. For example in the *Rainbow Warrior* arbitration, New Zealand sought the return of the two agents to detention on the island of Hao, since (as the Tribunal held) the circumstances relied on by France to justify their continued removal either did not exist or were no longer operative. According to New Zealand, France was thus obliged to return them to and to detain them on the island for the balance of the three years; that obligation had not expired since time spent off the island was not to be counted for that purpose. The Tribunal disagreed. In its view, the obligation was for a fixed term which had expired, and there was thus no question of cessation.[243] The question might still be asked: assuming the correctness of this view as a matter of the interpretation of the primary obligation, what was New Zealand's entitlement as a matter of restitution? It is not the case that restitution is only available when the obligation

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[240] *Ibid.*, p. 107; see also France (*ibid.*, p. 106) and see also A/CN.4/504, p. 19, para. 70 for a similar view.

[241] A/CN.4/492, p. 14.

[242] See above, paras. 44-52.

[243] *U.N.R.I.A.A.*, vol. XX, p. 217 (1990), cited above, para. 47.

breached is still in force (even though that is true for cessation). The Tribunal avoided answering the question, holding that New Zealand's request was only for cessation. But New Zealand, while it had expressly renounced any demand for compensation, sought the return of the two agents to the island, and apparently did so under the form of restitution even if (as happened) the Tribunal were to hold that questions of cessation of wrongful conduct no longer arose.

133. Evidently the Tribunal was concerned above all to bring a long-running dispute to an end in a manner broadly acceptable to both parties. Limited by the *non ultra petita* rule and by New Zealand's refusal to accept compensation in lieu of performance, the Tribunal was not anxious to consider arguments about performance under the guise of restitution. But one may infer that the *status quo ante* for the two agents - their presence under military custody on the island - was of no value to New Zealand if there was no continuing obligation on the part of France to keep them there. The return of the two agents to the island would have been an empty formality.

134. Two lessons may be drawn from this episode. First, while it may be appropriate (as France itself proposes[244]) to define restitution as the "reestablishment of the pre-existing situation" as distinct from the mere return of persons, property or territory, a return to the *status quo ante* may be of little or no value if the obligation breached does not remain in force. Conversely, no option may exist for an injured State to renounce restitution if the continued performance of the obligation breached is incumbent upon the responsible State and the former State is not (or not alone) competent to release it from such performance. Both positively and negatively, the distinction in theory between cessation and restitution may have important consequences in terms of the obligations of the States concerned and the remedial options open to them. The second lesson is of a more general character: in practice, dispute settlement bodies act flexibly in their interpretation of the positions of States parties, and in selecting one remedy over another. It seems that no set of rules dealing with the consequences of internationally wrongful acts can exclude such flexibility, no matter how categorical a preference may be stated for one form of reparation over another.

Restitution and compensation

135. This second point is equally applicable to the question of the relation between restitution and compensation. Article 43 is the first of the specific forms of reparation dealt with in Chapter II. Article 44 goes on to deal with compensation, but only "if and to the extent that the damage is not made good by restitution in kind". It is clear that the Commission intended thereby to lay down a firm principle as to the priority of restitution over compensation. This was consistent with the views of the then Special Rapporteur, Mr. Arangio-Ruiz, who noted that "restitution in kind comes foremost, before any other form of reparation *lato sensu*, and particularly before reparation by equivalent".[245] Under this approach, the injured State may

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[244] Above, para. 129.

[245] Preliminary Report, *Yearbook ... 1988*, vol. II, part 1, p. 38 (para. 114), with references to earlier literature. Later he referred to "the purely statistical prevalence of reparation by equivalent ... coupled with the logical primacy of restitution in kind": *ibid.*, p. 41 (para. 131).

insist on restitution, and has a right to restitution unless one of the exceptions specified in article 43 applies. The approach has, however, been criticised as too rigid and as inconsistent with practice, both by a number of governments and by some writers.[246] It also contrasts with the approach taken to restitution under some national legal systems.[247]

136. In the *Case concerning Passage through the Great Belt (Finland v. Denmark) (Provisional Measures of Protection)*,[248] Finland sought the indication of interim measures of protection to prevent the construction of a bridge across the Great Belt which, it alleged, would impede passage of drill ships and oil rigs, contrary to its rights of free transit under a range of treaties. In response, Denmark argued *inter alia* that even if the construction of the bridge might violate Finland's rights of transit, this would only happen occasionally and only in relation to a tiny fraction of ships using the strait. Since Finland's rights could be adequately protected by financial and other means, an order for restitution would be "excessively onerous" for Denmark. And if Finland had no right to insist on the non-construction of the bridge, *a fortiori* it had no right to provisional measures.

137. The Court declined to indicate provisional measures. Since passage would not actually be impeded for three years or more, during which time the case could be decided on the merits, there was no demonstrated urgency. But it did not accept Denmark's argument as to the impossibility of restitution. Noting that action taken by a party during the course of litigation could not be allowed to affect the rights of the other party, it said:

> "whereas the Court is not at present called upon to determine the character of any decision which it might make on the merits; whereas in principle however if it is established that the construction of works involves an infringement of a legal right, the possibility cannot and should not be excluded *a priori* of a judicial finding that such works must not be continued or must be modified or dismantled ..."[249]

138. In the *Case concerning the Vienna Convention on Consular Relations (Paraguay v. United States) (Request for Provisional Measures)*, Paraguay sought and was granted provisional

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[246] See especially C. Gray, "The Choice between Restitution and Compensation" (1999) 10 *EJIL* 413.

[247] Historically, common law systems applied the sole remedy of damages in civil cases not involving the return of property, subject only to special exceptions for specific performance and other remedies in equity. The situation is, however, changing to some extent, with the increased availability of these remedies and the development of the law of restitution. On specific performance see e.g. *Co-operative Insurance Society Ltd. v. Argyll Stores Ltd.* [1998] A.C. 1. On restitution see e.g. *Kleinwort Benson Ltd. v. Glasgow City Council* [1999] 1 A.C. 153.

[248] *I.C.J. Reports* 1991 p. 12.

[249] *Ibid.*, p. 19 (para. 31). Judge *ad hoc* Broms interpreted this passage of the Order as rejecting the "Danish theory", in accordance with which Finland had no right to restitution in kind even if it succeeded on the merits: *ibid.* at p. 30.

measures in an attempt to prevent the execution of Angel Breard, one of its nationals who had been convicted for murder. Paraguay's claim arose from the admitted failure of the United States to notify Paraguay of Breard's arrest, in breach of the notification requirement in article 36 (1) (b) of the Vienna Convention on Consular Relations.[250] The United States argued that no question of restitution could arise under the Convention; all Paraguay was entitled to was an apology and assurances against repetition, and these it had been given. In particular it argued that "the automatic invalidation of the proceedings initiated and the return to the *status quo ante* as penalties for the failure to notify not only find no support in State practice, but would be unworkable".[251] Paraguay by contrast argued for complete restitution: "any criminal liability currently imposed on Mr. Breard should accordingly be recognized as void by the legal authorities of the United States and... the *status quo ante* should be restored in that Mr. Breard should have the benefit of the provisions of the Vienna Convention in any renewed proceedings brought against him".[252]

139. Again the Court declined to enter into the issue of the relationship between the right claimed and the remedy of restitution. For the majority, it was sufficient that Breard's "execution would render it impossible for the Court to order the relief that Paraguay seeks and thus cause irreparable harm to the rights it claims".[253]

140. Rather similar issues arose in a further death penalty case involving a failure of consular notification, the *LaGrand Case (Germany v. United States of America)*.[254] In this case too the Court, acting *ex parte* under article 75 (1) of its Rules, indicated interim measures.[255] The case remains *sub judice*.

141. These cases concerned applications for provisional measures, where a balance has to be struck between the protection of the rights asserted (but not yet established) by the Applicant State and respect for the position of the Respondent State, *ex hypothesi* not yet held to have been acting unlawfully (at all or in the relevant respect). But there is a distinction between them. In

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[250] *I.C.J. Reports*, 1998 p. 248.

[251] *Ibid.*, p. 254 (para. 18).

[252] *Ibid.*, p. 256 (para. 30).

[253] *Ibid.*, p. 257 (para. 37). Judge Oda disagreed, although voting with the Court "for humanitarian reasons": *ibid.*, p. 262. President Schwebel stressed the importance of the principle of compliance with treaties: "An apology and Federal provision for avoidance of future such lapses does not assist the accused, who Paraguay alleges was or may have been prejudiced by lack of consular access, a question which is for the merits." *Ibid.*, p. 259.

[254] *I.C.J. Reports*, 1999 p. 9.

[255] It may be noted that in both cases the executions proceeded notwithstanding the orders. See "Agora: *Breard*" (1998) 92 *AJIL* 666. The *Breard* case was subsequently withdrawn at the request of Paraguay.

the *Great Belt* case, the right sought to be protected was precisely the right which would be the subject of the merits phase, viz., the right of unimpeded passage through the Great Belt for completed rigs. In that context the Court refused to exclude the possibility that restitution might be the appropriate remedy (even if it were to involve, hypothetically, the cancellation or substantial modification of the bridge project).[256] In the death penalty cases, the relationship between the breach of the obligation of consular notification and the conviction of the accused person was indirect and contingent. It could well have been the case that the subsequent trial was entirely proper and fair and the failure of notification had no effect on the conviction. The United States had jurisdiction to try the accused for a capital offence, and was not a party to any instrument precluding the imposition of the death penalty. Only if a sufficient causal connection could be established between the United States' failure to notify and the outcome of the trial could the question of restitution arise at all. By the time of the trial, prior notification *as such* had become impossible, since the time for performance had passed and no later performance could substitute for it.

142. Thus what constitutes restitution depends, to some extent at least, on the content of the primary obligation which has been breached. In cases not involving the simple return of persons, property or territory of, or belonging to, the injured State (restitution in the narrow sense), the notion of return to the *status quo ante* has to be applied having regard to the respective rights and competences of the States concerned. This is of particular significance where what is involved is a procedural obligation conditioning the exercise of the substantive powers of a State. Restitution in such cases, if it is available at all, cannot be allowed to give the injured State after the event more than it would have been entitled to if the obligation had been performed. In other words, the notion of the "*status quo ante*" is a relative one, and if the respondent State could and would lawfully have achieved the same or effectively the same result without a breach of the obligation, the notion of a *general* return to the earlier situation may be excluded.[257]

143. In the opinion of the Special Rapporteur, these qualifications and understandings of the principle of restitution can be accommodated by the careful formulation of article 43 and of the exceptions set out in it, and by appropriate explanations in the commentary. The question is whether, on this basis, the principle of the primacy of restitution should be retained. On balance it should be. It is true that the authority usually relied on for that primacy - the *Chorzów Factory* case[258] - does not actually decide the point, since by the time of the decision Germany sought

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[256] Denmark's obligation to allow transit through the Great Belt (whatever its extent) was a continuing one, so that the removal of any unlawful obstruction would have involved cessation as much as restitution. See above, paras. 45, 134.

[257] This does not, however, exclude the possibility that the earlier procedure may still be able to be effectively replicated, if circumstances have not changed to such an extent that such replication would be meaningless or disproportionately onerous. These elements are incorporated in national legal rules about restitution under the rubric of doctrines such as reliance and *bona fide* change of position. Such factors were taken into account, implicitly at least, in the International Court's consideration of issues of restitution in the *Case concerning the Gabčíkovo-Nagymaros Project, I.C.J. Reports,* 1997 p. 7.

[258] *P.C.I.J., Series A*, No. 17 (1928), p. 47, cited above, para. 24.

only compensation and not the return of the property. It is also true that courts and tribunals have been reticent about the award of full-scale restitution, and that the decision perhaps most associated with the idea of restitution - the decision of Sole Arbitrator Dupuy in the *Texaco* arbitration[259] - has been widely criticised[260] and has not been followed in later mixed arbitrations.[261] But these were, precisely, mixed arbitrations, where the right of eminent domain of the responsible State (and its sovereignty over its natural resources) has to be balanced against the obligations it has assumed for the protection of those resources, whether by treaty or otherwise. In the context of State to State relations, restitution plays a vital role in principle, especially because of its close relation to the question of the performance of international obligations. A second reason for preserving the principle is that there is little call from Governments to abandon it. Despite doubts expressed by one or two Governments,[262] article 43 as adopted on first reading, which does express a qualified priority for restitution, has been generally well received. Indeed most of the comments that have been made are directed at reducing the number and scope of the exceptions to the principle, rather than overturning it. And thirdly, the abandonment of the principle would require the Commission to formulate, against the background of a legal presumption in favour of compensation, those cases where restitution is exceptionally required. The United States notes that restitution is particularly significant in cases involving "illegally seized territory or historically or culturally valuable property",[263] but it is certainly not limited to such cases. Moreover expressing the point in the form of an exception might tend to imply that, in cases not covered, States may, after the event, purchase the freedom not to respect their international obligations. The principle of the priority of restitution should be retained, subject to defined exceptions.

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[259] *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic*, Award on the Merits, 19 January 1977, 53 I.L.R. 389 at pp. 507-8 (para. 109).

[260] See e.g. World Bank Study, *Legal Framework for the Treatment of Foreign Investment* (IBRD, Washington, 1992) vol. I, p. 140. For a balanced account, see R. Higgins, "The Taking of Property by the State" 176 *Recueil des Cours* 321 (1982) at pp. 314-321.

[261] *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic*, 12 April 1977, 62 I.L.R. 140 at p. 200. See also the earlier decision, *BP Exploration Company (Libya) Ltd. v. Government of the Libyan Arab Republic*, 10 October 1973 and 1 August 1974, 53 I.L.R. 297 at p. 354.

[262] See above, para. 129.

[263] A/CN.4/488, pp. 107-108.

(c) Exceptions to restitution

144. The four exceptions to restitution formulated in article 43 were described above.[264]

(a) Material impossibility. There can be no doubt that restitution is not required where it has become "materially" (i.e. practically, *materiellement*) impossible, a qualification recognized both in the *Chorzów Factory* dictum,[265] by the Tribunal in the *Forests of Central Rhodopia* case,[266] and in the literature. Nor is it doubted in the comments of Governments.

(b) Breach of a peremptory norm. There is likewise no doubt that restitution cannot be required if it would involve a breach of a peremptory norm (i.e., a norm of *jus cogens*). The difficulty is rather, as France observes,[267] to think of realistic examples. One possibility might be the situation raised by the *Northern Cameroons* case.[268] Cameroon there argued that the administration of the Northern Cameroons in administrative union with the colony of Nigeria, and the subsequent separate holding of a plebiscite for the Northern Cameroons, was a breach of the Trusteeship Agreement. But that Agreement had been terminated with the approval of the General Assembly, giving effect to the expression of the wishes of the people. To have sought to reverse that decision by seeking restitution could, correspondingly, itself have failed to respect their wishes. No doubt aware of these and other difficulties, Cameroon sought only declaratory relief, which the Court declined to give on the grounds that the decision could have no legal effect so far as the respondent State, the United Kingdom, was concerned. No question of a breach of a peremptory norm was raised or considered.[269] In the Special Rapporteur's view, the situation dealt within article 43 (b) is covered already by article 29 bis. As noted already, the circumstances precluding wrongfulness (among them, conflict with a peremptory norm of

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[264] See above, para. 128.

[265] *P.C.I.J., Series A*, No. 17 (1928), p. 47 ("if this is not possible"); see above, para. 24.

[266] *U.N.R.I.A.A.*, vol. III, p. 1405 (29 March 1933); above, para. 128.

[267] Above, para. 129.

[268] *I.C.J. Reports*, 1963 p. 16.

[269] Historically, cases concerning the seizure of slave ships and other actions to suppress the slave trade raised issues of international legality (see e.g. *The Le Louis* (1817) 2 Dods 210; *Buron v. Denman* (1848) 2 Ex. 167; A.P. Rubin, *Ethics and Authority in International Law* (Cambridge, CUP, 1997) pp. 97 ff.). But at least since the Congress of Berlin of 1885, no question of the return of former slaves by way of restitution could be contemplated. In the *Eichmann* case, Argentina withdrew its demand for the restitution of Eichmann, charged with war crimes and crimes against humanity: see S.C. Res. 138 (1960), 23 June 1960; Argentina-Israel Joint Communique, 3 August 1960, reprinted in *Attorney-General of the Government of Israel v. Adolf Eichmann*, District Court, 12 December 1961, 36 I.L.R. 5, 59 (para. 40).

general international law) apply equally to the secondary obligations dealt within Part II, including the obligation of restitution.[270] Thus article 43 (b) is unnecessary and can be deleted.[271]

(c) Restitution disproportionately onerous. In accordance with article 43 (c), restitution need not be provided if the benefit to the injured State of obtaining restitution (as distinct from compensation) is substantially outweighed by the burden for the responsible State of providing it. This might have applied, for example, in the *Great Belt* case[272] if the bridge had actually been built before the issue of the right of passage had been raised by Finland. Where the cost to the responsible State of dismantling a structure is entirely disproportionate to the benefits for the injured State or States of doing so, restitution should not be required. The United States, while not opposing paragraph (c), calls for further clarification of the phrase "a burden out of all proportion to the benefit which the injured State would gain". But as with other expressions of the principle of proportionality, it is difficult to be more precise in the text itself.[273] One useful clarification might be to stress that the notion of proportionality here is not only concerned with cost and expense but that the significance of the gravity or otherwise of the breach, relative to the difficulty of restoring the *status quo ante*, must also be taken into account. It seems sufficient to spell this out in the commentary.

(d) Disproportionate jeopardy to the political independence or economic stability of the responsible State. A number of States are strongly critical of this fourth exception, of which again no good examples are given. The general question of reparation which threatens to deprive a people of their means of subsistence (article 42 (3) as adopted on first reading) has already been discussed,[274] and the point made that restitution in its ordinary sense involves the return of territory, persons or property wrongfully seized or detained, or more generally a return to a situation before the breach: it is difficult to see how such a return could have the effect of jeopardizing the political independence or economic stability of the State responsible for the breach. In any event, if restitution plausibly and disproportionately threatens the political independence or economic stability of the responsible State, the requirements of the third exception (para. (c) above) will surely have been satisfied. For these reasons, paragraph (d) is likewise unnecessary.

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[270] See above, para. 7 (1). For article 29 bis see *Report of the International Law Commission on the work of its fifty-first session* (*General Assembly Official Records*, Fifty-fourth Session, Suppl. 10, 1999) paras. 306-318.

[271] A more significant case is that of continuing wrongful acts in breach of a peremptory norm (e.g. a continuing case of genocide or other crime against humanity). Such cases concern cessation and performance, not restitution: see above, para. 126.

[272] See above, paras. 136-137.

[273] See generally D.W. Greig, "Reciprocity, Proportionality and the Law of Treaties" (1994) 44 *Virginia JIL* 295 at p. 398.

[274] See above, paras. 38-42.

(d) The formulation of article 43

145. As to the formulation of the article, France criticises the use of the term "restitution in kind" in article 44 on the ground that it is not limited to return of stolen property or territory. But the meaning of the phrase is generally understood and accepted, and a definition essentially in terms of the "reestablishment of the pre-existing situation" is provided. Secondly, in its original formulation article 43 (c) balanced the cost to the responsible State against the benefit of the injured State of obtaining restitution. But there may of course be several or even many States (or other entities) injured by the same act, and the interests of all of them should be considered in the equation. Paragraph (c) should be formulated accordingly.

146. In the Special Rapporteur's view, article 43 can read as follows:

"Restitution

A State which has committed an internationally wrongful act is obliged to make restitution in kind, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution in kind:

(a) is not materially impossible; ...

(c) would not involve a burden out of all proportion to the benefit which those injured by the act would gain from obtaining restitution instead of compensation."

3. Compensation

(a) Existing article 44

147. Article 44 provides:

"Compensation

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act compensation for the damage caused by that act, if and to the extent that the damage is not made good by restitution in kind.

2. For the purposes of the present article, compensation covers any economically assessable damage sustained by the injured State, and may include interest and, where appropriate, loss of profits."

148. Despite the formal priority given to restitution by article 43, the commentary to article 44 acknowledges that compensation is "the main and central remedy resorted to following an internationally wrongful act".[275] Monetary compensation differs from payments tendered or awarded by way of satisfaction in that its function is purely compensatory; it is intended to

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[275] Commentary to article 44, para. (1), text in *Yearbook ... 1993*, vol. II (Part 2), pp. 67-76.

represent, as far as may be, the damage suffered by the injured State as a result of the breach. But despite the large number of decided cases before arbitral tribunals in which issues of the assessment of compensation have been faced, the commentary declines to go into detail in article 44, on the basis that "the rules on compensation were bound to be relatively general and flexible".[276] The commentary does discuss questions of causation, including the influence of multiple causes,[277] but on the central issue of the assessment of compensation it confines itself to such general statements as "compensation is the appropriate remedy for 'economically assessable damage' i.e. damage which is susceptible of being evaluated in economic terms",[278] including for moral and material damage.[279] Compensation is thought of as confined to monetary payments,[280] although there is no reason why it could not also take the form, as agreed, of other forms of value.

149. The commentary goes on to discuss the award of interest and loss of profits. Interest is dealt with below as a separate category.[281] Loss of profits is discussed at length, but rather inconclusively. The commentary notes that ...

> "compensation for lucrum cessans is less widely accepted in the literature and in practice than is reparation for damnum emergens. If loss of profits are to be awarded, it would seem inappropriate to award interest on the profit-earning capital over the same period of time, simply because the capital sum cannot be earning interest and notionally employed in earning profits at one and the same time ... The essential aim is to avoid 'double recovery' in all forms of reparation."[282]

After a review of relevant case-law (including divergent decisions of the Iran-United States Claims Tribunal in cases involving expropriation of property), the commentary concludes that ...

> "In view of the divergences of opinion which exist with regard to compensation for lucrum cessans, the Commission has come to the conclusion that it would be extremely difficult to arrive in this respect at specific rules commanding a large measure of support ... The state of the law on all these questions is ... not sufficiently settled and the Commission at this stage, felt unable to give precise answers to these questions or to

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[276] *Ibid.*, para. (3).

[277] *Ibid.*, paras. (6)-(13). See above, paras. 27-29, 31-37 for discussion.

[278] *Ibid.*, para. (16).

[279] *Ibid.*, para. (17).

[280] *Ibid.*, para. (18), citing Grotius, *De Iure Belli ac Pacis* (1636), Bk. II, Ch. 17, § 17: "money is the common measure of valuable things".

[281] See below, paras. 195-214.

[282] Commentary to article 44, para. (27).

> formulate specific rules relating to them. It has therefore felt it preferable to leave it to the States involved or to any third party involved in the settlement of the dispute to determine in each case whether compensation for loss of profits should be paid."[283]

In the event, article 44 (2) says only that compensation "may include ... where appropriate, loss of profits", an endorsement as lukewarm as can be imagined.

150. Government comments on article 44 raise a number of important questions. The first is whether a more detailed provision is needed. Some governments are of the view that, given the complexity and importance of the issues involved, further guidance on the standard of compensation under customary international law would be welcome - in particular so far as concerns "the assessment of pecuniary damage", including interest and loss of profits.[284] France criticises the "overly concise" drafting of article 44 (all the more so if compared to the detailed treatment of articles 45 and 46) and advocates a return "to a more analytical version" based on the work done by Mr. Arangio-Ruiz in his Second Report (1989) and on international practice and jurisprudence.[285] By contrast, others stress the need for some flexibility in dealing with specific cases; in their view it is sufficient to set out the general principle of compensation in article 44. They also note that "detailed and comprehensive consideration of the law on reparation and compensation would take considerable time and would delay the completion of the Commission's work".[286]

151. As to the content of that general principle, there is support for the view that in principle the amount of compensation payable is precisely the value the injured State would have received, if restitution had been provided. The United States regards the present drafting of paragraph 1 as a "long-established principle reflected in customary international law and innumerable bilateral and multilateral agreements". In its view, the fact that compensation is to be provided to the extent that restitution is not makes it clear that the amount of compensation due should be equivalent to the value of restitution.[287] By contrast, Japan is concerned by a possible interpretation of paragraph 1, according to which "the wrongdoing State would be able to reject the request made by the injured State for (financial) compensation with the excuse that

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[283] *Ibid.*, para. (39).

[284] Denmark on behalf of the Nordic countries (A/CN.4/488, p. 108); see also A/CN.4/496, p. 19, para. 125 (emphasising the need for greater legal security) and A/CN.4/504, p. 19, para. 71.

[285] A/CN.4/488, p. 107; see also A/CN.4/496, p. 20, para. 125 and A/CN.4/504, p. 19, para. 71 (taking as an example "the principle whereby damage suffered by a national [is] the measure of damage suffered by the State").

[286] A/CN.4/496, p. 19, para. 124.

[287] A/CN.4/488, p. 108; the United States particularly refers to the *Lusitania* and *Letelier* cases, and notices that that principle "has been applied to wrongful death cases as well".

restitution in kind had not been proved completely impossible". Such a reading of the provision would thus "severely restrict the freedom of the injured State to choose whatever form of full reparation it deems appropriate".[288]

152. Another issue concerns the need to refer to interest and loss of profits in paragraph (2), and the proper formulation of any such reference. Some Governments consider it unnecessary to specify as a legal obligation the payment of interest and compensation for loss of profits.[289] This is apparently the view adopted by the French Government, which proposes reformulating the paragraph as follows:

> "For the purposes of the present article, the compensable damage deriving from an internationally wrongful act is any loss connected with such act by an uninterrupted causal link."[290]

On the other hand, a number of Governments firmly assert that, "to the extent that it represents the actual loss suffered by the claimant, the payment of interest is not an optional matter but an obligation".[291] Accordingly, paragraph 2 should provide that compensation "shall" (rather than "may") include interest.[292] The United States refers to decisions of the Iran-United States Claims Tribunal and the United Nations Compensation Commission in support of its view that the present drafting of paragraph 2 "goes counter not only to the overwhelming majority of case law on the subject but also undermines the 'full reparation' principle".[293]

153. These comments raise a number of issues as to article 44. One of these, the question of interest, is dealt with separately below.[294] But the main issue raised is whether article 44 should

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[288] A/CN.4/492, p. 14.

[289] A/CN.4/504, p. 19, para. 71.

[290] A/CN.4/488, p. 109.

[291] United Kingdom *(ibid.*, p. 108); see also A/CN.4/496, p. 20, para. 125 ("the payment of interest should be the basic and general rule for compensation").

[292] United States, considering that article 44 would represent "a step backward in the international law of reparation" in the absence of such a revision (A/CN.4/488, pp. 109). See also A/CN.4/504, p. 19, para. 71 where one government argues that replacing "may" by "shall" would "deprive the wrongdoing State of an incentive to delay payment of compensation" while another favours the idea that "a sufficient grace period" for the payment of compensation be allowed to the wrongdoing State before fixing the provision of interest. Governments suggesting this substitution do not seem to favour the deletion of the words "where appropriate" before "loss of profits" (see Mongolia, A/CN.4/488, p. 108).

[293] *Ibid.*, p. 109.

[294] See below, paras. 195-214.

spell out in more detail accepted principles of assessment of compensation, as well as what limitations might be expressed on the assessment of full compensation, to avoid imposing disproportionate burdens on the responsible State.

(b) Assessment of compensation: general principle or detailed criteria?

154. In his Second Report, Mr. Arangio-Ruiz discussed "reparation by equivalent" in some detail, proposing two alternative articles, one shorter and one rather more detailed. As its commentary implies, the Commission preferred the shorter version, which became article 44.[295] In consequence, some of the issues discussed by Mr. Arangio-Ruiz in his Second Report - the distinction between moral injury to individuals and to the State, the distinction between lawful and unlawful expropriation, methods of assessing the value of property taken, especially where this is done on a "going concern" basis - are only dealt with briefly, if at all, in article 44 and its commentary.

155. There is, evidently, a need for caution in laying down more specific rules relating to compensation. Although a deal of guidance is available in certain fields (notably diplomatic protection, especially as concerns takings of, or damage to, property), there have been relatively few recent reasoned awards dealing with the assessment of material damage as between State and State (i.e. outside the field of diplomatic protection). Damages have been sought in approximately one third of cases commenced before the International Court, but so far, the Court has only awarded damages in one case - the *Corfu Channel case (Assessment of Compensation)*.[296] Indeed it has been argued that the Court has shown some aversion to awards of damages as compared with declaratory or other relief. For example in the *Nuclear Tests case (New Zealand v. France)*, it held that the case was moot following the French commitment not to conduct further atmospheric tests, notwithstanding an unfulfilled New Zealand demand for compensation.[297] In the *Case concerning the Gabcíkovo-Nagymaros Project*, where both parties claimed substantial compensation against the other, the Court first affirmed the classical rules as

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[295] See Arangio-Ruiz, *Second Report*, in Yearbook ... 1989, vol. II, part 1, pp. 3-22, and for the text of his proposals see *ibid.*, p. 60. For the report of the Drafting Committee see *Yearbook ... 1992*, vol. I, pp. 219-220. Since 1989, there have been further developments in jurisprudence and practice, summarized *inter alia* by M. Iovane, *La Riparazione nella Teoria e Nella Prassi dell'Illecito Internazionale* (Milan, Guiffrè, 1990); E. Decaux, "Responsabilité et réparation", *in La responsabilité dans le système international: colloque du Mans*, (Société française pour le droit international, Pedone, Paris, 1991) pp. 47-190, as well as in the sources cited below. The general comparative law experience is well summarized by H. Stoll, "Consequences of Liability: Remedies", in A. Tunc (ed.), *International Encyclopaedia of Comparative Law*, vol. XII, ch. 8.

[296] *I.C.J. Reports* 1949, p. 249. See C. Gray, *Judicial Remedies in International Law* (Oxford, Clarendon Press, 1987) pp. 77-95 for a somewhat sceptical account of the practice.

[297] *I.C.J. Reports* 1974, p. 457 at pp. 475-6 (paras. 55-58). Cf. *Request for an Examination of the Situation ...*, *I.C.J. Reports* 1995, p. 288 at p. 305 (para. 59).

to reparation and compensation, then went on to suggest that a "zero-sum agreement" for damages (as distinct from financial contributions to the continuing project) would be appropriate. The relevant passage reads:

> "It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it. In the present Judgment, the Court has concluded that both Parties committed internationally wrongful acts, and it has noted that those acts gave rise to the damage sustained by the Parties; consequently, Hungary and Slovakia are both under an obligation to pay compensation and are both entitled to obtain compensation. Slovakia is accordingly entitled to compensation for the damage suffered by Czechoslovakia as well as by itself as a result of Hungary's decision to suspend and subsequently abandon the works at Nagymaros and Dunakiliti, as those actions caused the postponement of the putting into operation of the Gabcíkovo power plant, and changes in its mode of operation once in service. Hungary is entitled to compensation for the damage sustained as a result of the diversion of the Danube, since Czechoslovakia, by putting into operation Variant C, and Slovakia, in maintaining it in service, deprived Hungary of its rightful part in the shared water resources, and exploited those resources essentially for their own benefit.
>
> Given the fact, however, that there have been intersecting wrongs by both Parties, the Court wishes to observe that the issue of compensation could satisfactorily be resolved in the framework of an overall settlement if each of the Parties were to renounce or cancel all financial claims and counter-claims."[298]

In both cases, it may be inferred, the Court did not regard issues of compensation (as distinct from a return to legality or the cessation of allegedly wrongful conduct) as being at the heart of the case. But in the *Gabcíkovo-Nagymaros* case, in particular, it reaffirmed the established law of reparation, including compensation, in State-to-State cases. Moreover too much should not be read into the absence of awards of compensation by the Court. In some cases States have preferred to settle claims by the payment of damages (on a without prejudice basis) rather than see a case go to judgement on the merits,[299] or even on jurisdiction.[300] In others, the parties have sought to settle questions after an award or judgement on the principle of responsibility, or the

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[298] *I.C.J. Reports* 1997, p. 7, at p. 81 (paras. 152-3). See also at pp. 169-70 (Judge Oda).

[299] As in *Certain Phosphate Lands in Nauru*, *I.C.J. Reports* 1992, p. 240, and for the Court's order of discontinuance following the settlement, *I.C.J. Reports* 1993, p. 322; *Case concerning Passage through the Great Belt*, *I.C.J. Reports* 1992, p. 348 (order of discontinuance following settlement).

[300] As in *Aerial Incident of 3 July 1988*, *I.C.J. Reports* 1996, p. 9 (order of discontinuance following settlement).

case has been discontinued for other reasons.[301] Several pending cases involve, or include, claims for reparation, as well as a number of counter-claims for reparation.[302]

156. Apart from the International Court, other established courts and tribunals are dealing with issues of reparation, including compensation.

- The Iran-United States Claims Tribunal has developed a substantial jurisprudence on questions of assessment of damage and the valuation of expropriated property. There are substantial outstanding State-to-State claims for reparation.[303]

- Human rights courts and other bodies, in particular the European and Inter-American Court of Human Rights, have developed a body of jurisprudence dealing with what article 41 (formerly 50) of the European Convention on Human Rights refers to as "just satisfaction".[304] Hitherto, amounts of compensation or damages awarded or

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[301] The *Case concerning Military and Paramilitary Activities in and against Nicaragua* was withdrawn after Nicaragua's written pleadings on compensation had been filed: *I.C.J. Reports* 1991, p. 47 (order of discontinuance).

[302] Counter-claims have been held admissible in the following cases: *Case concerning Application of the Convention for the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) Counter-claims*, I.C.J. Reports 1997, p. 243; *Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America) Counter-claims*, I.C.J. Reports 1998, p. 190; *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Order of 30 June 1999.

[303] For reviews of the Tribunal's jurisprudence on valuation and compensation see, *inter alia*, G. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996) chs. 5, 6, 12; C.N. Brewer and J.D. Brueschke, *The Iran-United States Claims Tribunal* (Nijhoff, The Hague, 1998), chs. 14-18; M. Pellonpää, "Compensable Claims Before the Tribunal: Expropriation Claims", in R.B. Lillich and D.B. McGraw (eds.), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Transnational Publishers, Irvington-on-Hudson, 1998) pp. 185-266; D.P. Stewart, "Compensation and Valuation Issues", ibid., pp. 325-385.

[304] Article 41 (renumbered by Protocol 11 of 1994) provides:

> "If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

In the practice of the Court, "satisfaction" has included elements both of compensation and satisfaction in the sense of the Draft articles.

recommended by these bodies have generally been modest, though the practice is developing.[305]

- ICSID Tribunals under the Washington Convention of 1965 have jurisdiction to award damages or other remedies in cases concerning investments arising between States parties and nationals of other States. Some of these claims involve direct recourse to international law.[306]

- The International Tribunal on the Law of the Sea awarded substantial damages in various categories, plus interest, in its first case decided on the merits.[307]

- The United Nations Compensation Commission is a non-judicial body established by the Security Council to deal with compensation claims against Iraq arising "directly" from its invasion of Kuwait in 1990.[308] The mandate of the Commission is to decide upon the liability of Iraq "under international law",[309] and the Commission has laid down guidelines for the award of compensation which are subject to the approval of the Governing Council (consisting of the members of the Security Council). These guidelines have been applied to the processing of a very large number of claims.[310]

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[305] See the helpful review by D. Shelton, *Remedies in International Human Rights Law* (Oxford, Clarendon Press, 1999) chs. 8, 9. See further below, para. 157.

[306] See e.g. *Asian Agricultural Products Ltd. v. Republic of Sri Lanka* (1990) 4 ICSID Reports, p. 245.

[307] *The M.V. Saiga (No. 2)*, judgment of 1 July 1999, paras. 170-177; reprinted at 38 I.L.M. 1323 (1999).

[308] See above, para. 28. In addition to the works there cited see S. Boelaert-Suominen, "Iraqi War Reparations and the Laws of War: a Discussion of the Current Work of the United Nations Compensation Commission with Specific Reference to Environmental Damage During Warfare", *Austrian Journal of Public and International Law*, vol. 50, 1996, pp. 225-316; G. Christenson, "State Responsibility and the UN Compensation Commission: Compensating Victims of Crimes of State", in R. Lillich (ed.), *The United Nations Compensation Commission* (Irvington, Transnational Publishers, New York, 1995) pp. 311-364; A. Gattini, "La riparazione dei danni di guerra causati dall'Iraq", *Rivista di diritto internazionale*, vol. 76, 1993, pp. 1000-1046; B. Graefrath, "Iraqi Reparations and the Security Council", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 55, 1995, pp. 1-68; C. Romano, "Woe to the Vanquished? A Comparison of the Reparation Process after World War I (1914-18) and the Gulf War (1990-1)", *Austrian Review of International and European Law*, vol. 2, 1997, pp. 61-190.

[309] Security Council Resolution 687, 3 April 1991, para. 16.

[310] The guidelines and decisions of the Commission are to be found at http://www.unog.ch/uncc/decision.htm. Of particular relevance for present purposes are the following:

157. Whenever a particular tribunal or other body is established with competence to deal with claims for State responsibility and to award compensation, the question arises whether the resulting decisions form part of a "special regime" for reparation, amounting to a *lex specialis*. There are no doubt, to a greater or lesser degree, elements of a *lex specialis* in the work of the bodies mentioned above (as well as in relation to the Dispute Settlement Mechanism of the World Trade Organization, the focus of which is firmly on cessation rather than reparation[311]). In principle, States are free to establish mechanisms for the settlement of disputes which focus only on certain aspects of the consequences of responsibility, in effect waiving or leaving to one

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Decision 3: S/AC.26/1991/3; 23 October 1991: Personal Injury and Mental Pain and Anguish

Decision 7: S/AC.26/1991/7/Rev.1; 17 March 1992: Criteria for Additional Categories of Claims

Decision 8: S/AC.26/1992/8; 27 January 1992: Determination of Ceilings for Compensation for Mental Pain and Anguish

Decision 9: S/AC.26/1992/9; 6 March 1992: Propositions and Conclusions on Compensation for Business Losses: Types of Damages and Their Valuation

Decision 11: S/AC.26/1992/11; 26 June 1992: Eligibility for Compensation of Members of the Allied Coalition Armed Forces

Decision 13: S/AC.26/1992/13; 25 September 1992: Further Measures to Avoid Multiple Recovery of Compensation by Claimants

Decision 15: S/AC.26/1992/15; 4 January 1993: Compensation for Business Losses Resulting from Iraq's Unlawful Invasion and Occupation of Kuwait where the Trade Embargo and Related Measures Were also a Cause

Decision 16: S/AC.26/1992/16; 4 January 1993, Awards of Interest

Decision 19: S/AC.26/Dec.19 (1994); 24 March 1994: Military Costs

Decision 40: S/AC.26/Dec.40 (1996); 18 December 1996: Decision Concerning the Well Blowout Control Claim.

[311] Agreement establishing the World Trade Organization, 15 April 1994, Annex 2, Understanding on Rules and Procedures governing the Settlement of Disputes, esp. Art. 3 (7), which provides for compensation "only if the immediate withdrawal of the measure is impractical and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement". For W.T.O. purposes, "compensation" refers to the future conduct, not past conduct ... see *ibid.*, article 22. On the distinction between cessation and reparation for W.T.O. purposes see e.g. *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather*, Panel Report, 21 January 2000, WT/DS126/RW, para. 6.49.

side other aspects. But there is a presumption against the creation of wholly self-contained regimes in the field of reparation, and it is the case that each of the bodies mentioned in the preceding paragraph has been influenced to a greater or lesser degree by the standard of reparation under general international law. Moreover practice in this field is notably dynamic, though it is significant that appeal is still being made to the *Chorzów Factory* principle as well as to the work of this Commission. For example the leading decision of the Inter-American Court of Human Rights on the question of reparation contains the following passage:

> "Reparation of harm brought about by the violation of an international obligation consists in full restitution (*restituto in integrum*), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm. As to emotional harm, the Court holds that indemnity may be awarded under international law and, in particular, in the case of human rights violations. Indemnification must be based upon the principles of equity ... [Article 63 (1) of the American Convention] does not refer to or limit the ability to ensure the effectiveness of the means of reparation available under the internal law of the State Party responsible for the violation, so [the Court] is not limited by the defects, imperfections or deficiencies of national law, but functions independently of it. This implies that, in order to fix the corresponding indemnity, the Court must rely upon the American Convention and the applicable principles of international law."[312]

Similarly in the *Papamichaelopoulos* case, the European Court of Human Rights noted that:

> "The unlawfulness of such a dispossession inevitably affects the criteria to be used for determining the reparation owed by the respondent State, since the pecuniary consequences of a lawful expropriation cannot be assimilated to those of an unlawful dispossession. In this connection, international case-law, of courts or arbitration tribunals, affords the Court a precious source of inspiration; although that case-law concerns more particularly the expropriation of industrial and commercial undertakings, the principles identified in that field are valid for situations such as the one in the instant case."[313]

158. The possibility that decisions of specialist international tribunals on compensation may involve elements of a *lex specialis* is thus no reason for the Commission to resile from the principle of full compensation embodied in article 44. On the other hand, it is a reason for

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[312] *Velásquez Rodríguez* case, I.A.C.H.R. Ser. C No. 7 (1989) at pp. 26-27, 30-1.

[313] *Papamichaelopoulos v. Greece (Article 50)*, E.C.H.R. Ser. A No. 330-B (1995) at para. 36. The Court went on to cite the *Chorzów Factory* dictum: *ibid.* Generally on the development of standards of compensation in the field of human rights see Shelton (1999); A. Randelzhofer and C. Tomuschat (eds.), *State Responsibility and the Individual. Reparation in Instances of Grave Violations of Human Rights* (Nijhoff, The Hague, 1999); R. Pisillo Mazzeschi, "La riparazione per violazione dei diritti umani nel diritto internazionale e nella Convenzione Europea", *La Comunità Internazionale*, vol. 53 (1998) p. 215.

hesitating to spell out in more specific detail the content of that principle, since it is and is likely to continue to be applied in different ways by different bodies and in different contexts. And there are two further reasons for caution:

- In the first place, much of the controversy over quantification of damages arises in relation to expropriated property, where (except in special cases such as *Chorzów Factory* itself, or *Papamichaelopoulos*), the question is the content of the primary obligation of compensation. It is not the Commission's function in relation to the present Draft articles to develop the substantive distinction between lawful and unlawful takings, or to specify the content of any primary obligation.[314]

- Secondly, now that the Commission has decided to deal with diplomatic protection as a separate topic (albeit a topic within the general field of responsibility), questions of quantification arising in the context of injury to aliens are more appropriately dealt with as part of that topic.

159. Despite these considerations, it can be argued that, if there do exist clear and more detailed rules in relation to the assessment of compensation that can be stated - either as a matter of pure codification or progressive development - then they should be stated. The difficulty is that it is very unclear whether there are such rules, as distinct from the general principles stated in articles 42 and 44.[315] The decisions reflect the wide variety of factual situations, the influence of particular primary obligations,[316] evaluations of the respective behaviour of the parties (both

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[314] On issues of expropriation and the value of income producing property see e.g. G.M. Erasmus, *Compensation for Expropriation: A Comparative Study* (Reese & UK National Committee of Comparative Law, Oxford, 1990); P.M. Norton, "A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation", *American Journal of International Law*, vol. 85, 1991, pp. 474-505; E. Penrose, G. Joffee and G. Stevens, "Nationalisation of Foreign-Owned Property for a Public Purpose: An Economic Perspective on Appropriate Compensation", *Modern Law Review*, vol. 55, 1992, pp. 351-367; W.C. Lieblich, "Determinations by International Tribunals of the Economic Value of Expropriated Enterprises", *Journal of International Arbitration*, vol. 7, 1990, pp. 37-67; W.C. Lieblich, "Determining the Economic Value of Expropriated Income-Producing Property International Arbitrations", *Journal of International Arbitration*, vol. 8, 1991, pp. 59-80; P. Friedland and E. Wong, "Measuring Damages for the Deprivation of Income-Producing Assets: ICSID Case Studies", *ICSID Review*, vol. 6, 1991, pp. 400-430; S.K. Seyed Khalil, "The Place of Discounted Cash Flow in International Commercial Arbitrations: Awards by Iran-United States Claims Tribunal", *Journal of International Arbitration*, vol. 8, 1991, pp. 31-50; C. Chatterjee, "The Use of the Discounted Cash Flow Method in the Assessment of Compensation", *Journal of International Arbitration*, vol. 10, 1993, pp. 19-24; H. Dagan, *Unjust Enrichment* (Cambridge, CUP, 1997) ch. 6.

[315] As Mr. Arangio-Ruiz also concluded: *Second Report* (1989), para. 28.

in terms of the gravity of the breach and their subsequent conduct), and, more generally, a concern to reach an equitable and acceptable outcome. As Aldrich observes, "when [international judges] are making a complex judgment such as one regarding the amount of compensation due for the expropriation of rights ... equitable considerations will inevitably be taken into account, whether acknowledged or not".[317] Experience in this and other contexts shows that, while illustrations can be given of the operation of equitable considerations and of proportionality in international law, the attempt to specify them in detail is likely to fail.

160. For these reasons, the Special Rapporteur agrees with the decision taken by the Commission in 1992 to formulate article 44 in general and flexible terms. A number of specific limitations on the principle of full compensation - in particular the rule against double recovery and, perhaps, the *non ultra petita* rule - can be stated, although these relate more to the invocation of responsibility than to the determination of quantum at the level of principle. They will accordingly be considered below, as will the issue of mitigation of responsibility.[318]

(c) Limitations on compensation

161. One question that does need consideration, however, is that of limiting compensation. Legal systems are generally concerned to avoid creating liabilities in an indeterminate amount in respect of an indeterminate class, and the special context of inter-State relations if anything aggravates such concerns. There are no *general* equivalents in international law to the limitation of actions or the limitation of liability which are used in national law for this purpose. The State is not a limited liability corporation, and there is no formal mechanism for dealing with issues of State insolvency. Given the capacity of States to interfere in the life of peoples and in economic relations, and the growth of substantive international law affecting both, the potential for indeterminate liability undoubtedly exists - even if it has usually not arisen in practice.[319]

162. The issue of limiting crippling compensation claims has already been discussed in the context of former article 42 (3), which provides that reparation should not result in depriving a population of its own means of subsistence.[320] For the reasons given, that provision is unnecessary so far as concerns restitution and satisfaction, but it does merit consideration in the

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[316] A matter particularly emphasized by Brownlie: *State Responsibility Part I* (Oxford, Clarendon Press, 1983) pp. 223-227.

[317] Aldrich (1996) p. 242. The passage quoted refers to the question of assessment of compensation for "the right to lift and sell petroleum products", but it is of more general application.

[318] Below, paras. 215-222.

[319] See e.g. the Chernobyl affair, which did not however give rise to any actual claims of responsibility: see J. Woodliffe, "Chernobyl: Four Years On", *International & Comparative Law Quarterly*, 39 (1990) 461 at pp. 466-468.

[320] See above, paras. 38-42.

context of compensation, since the rules relating to directness or proximity of damage are not guaranteed to prevent very large amounts being awarded by way of compensation in certain cases.

163. A robust answer to these concerns is that they are exaggerated, that compensation is only payable where loss has actually been suffered as a result (direct, proximate, not too remote) of the internationally wrongful act of a State, and that in such cases there is no justification for requiring the victim(s) to bear the loss. Moreover if States wish to establish limitation of liability regimes in particular fields of ultra-hazardous activity (e.g. oil pollution, nuclear accidents) they can always do so. In particular, the consistent outcome of orderly claims procedures (whether they involve lump sum agreements or mixed claims commissions or tribunals) has been a significant overall reduction of compensation payable compared with amounts claimed.[321] According to this view there is no case for a general provision on the subject.

164. The Special Rapporteur is inclined to agree. It is a matter for the Commission, however, to consider whether article 42 (3) or some similar provision should be inserted in article 44 to deal with cases of catastrophic and unforeseen liabilities. In any event, the question of mitigation of responsibility and mitigation of damages by reference to the conduct of the injured State do have a place in the draft and are discussed below.[322]

(d) Conclusion

165. For these reasons, the Special Rapporteur proposes that article 44 read as follows:

"*Compensation*

A State which has committed an internationally wrongful act is obliged to compensate for any economically assessable damage caused thereby, to the extent that such damage is not made good by restitution."

As compared with the version adopted on first reading, certain changes of wording have been made, essentially minor in character. First, consistently with other articles in this Part, article 44 is expressed as an obligation of the responsible State. The invocation of that responsibility by the injured State or States will be dealt with in Part Two bis. Evidently each State would only be entitled to invoke the obligation to pay compensation to the extent that it has itself suffered damage, or to the extent that it is duly claiming for damage suffered by its nationals.[323] Secondly, the two paragraphs of former article 44 have been subsumed into a single paragraph, covering all economically assessable damage. There is no need to mention loss of profits as a

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[321] See above, para. 41, note 77. Similar outcomes can be observed with the earlier mixed tribunals.

[322] See below, paras. 195-214.

[323] The extent to which a State may claim on behalf of persons or companies injured by the internationally wrongful act of a State will be dealt with in more detail in the topic of diplomatic protection.

separate head of damage, especially since any such mention will inevitably have to be qualified (giving rise to the "decodifying" effect which some Governments complained of in the earlier text[324]). Compensation for loss of profits is available in some circumstances and not others, but to attempt to spell these out would contradict the underlying strategy of article 44 as a general statement of principle. The commentary can deal with the different heads of compensable damage (including loss of profits) in a more substantial way. The subject of interest will be dealt with in a separate article.[325]

166. It will be a matter for the Commission to decide whether a more detailed formulation of the principle of compensation is required in the text of article 44, in which case proposals will be made in a further instalment of the present Report. The Special Rapporteur would, however, prefer a more discursive treatment in the commentary of the internationally recognized body of compensation rules and principles relating to the measure of damages. Among other things, it will be possible to do this with the necessary degree of flexibility.

4. Satisfaction

(a) Existing article 45

167. Article 45 provides:

"Satisfaction

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act satisfaction for the damage, in particular moral damage, caused by that act, if and to the extent necessary to provide full reparation.

2. Satisfaction may take the form of one or more of the following:

(a) an apology;

(b) nominal damages;

(c) in cases of gross infringement of the rights of the injured State, damages reflecting the gravity of the infringement;

(d) in cases where the internationally wrongful act arose from the serious misconduct of officials or from criminal conduct of officials or private parties, disciplinary action against, or punishment of, those responsible.

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[324] See above, paras. 149, 152.

[325] See below, paras. 195-214.

3. The right of the injured State to obtain satisfaction does not justify demands which would impair the dignity of the State which has committed the internationally wrongful act."

168. According to the commentary, satisfaction is intended to cover "only the non-material damage to the State", otherwise referred to as its "moral injury".[326] Earlier writers expressed this in terms such as "honour" or "dignity": the terms now have a rather archaic quality, although "dignity" survives in article 45 (3). Paragraph (1), in referring to "satisfaction for the damage, in particular moral damage, caused by that act", is intended to designate "any non-material damage suffered by a State as a result of an internationally wrongful act". This is the subject-matter of satisfaction.[327]

169. The commentary notes that satisfaction is a "rather exceptional" remedy, which is not available in every case. This is conveyed by the use of the term "if and to the extent necessary to provide full reparation".[328] Paragraph (2) provides a list of measures by way of satisfaction. Thus an apology, which "encompasses regrets, excuses, saluting the flag, etc. ... occupies a significant place in international jurisprudence": even if some of its forms (such as saluting the flag) "seem to have disappeared in recent practice", requests for apologies have increased in frequency and importance.[329] Another form, not mentioned in paragraph (2), is "recognition by an international tribunal of the unlawfulness of the offending State's conduct".[330]

170. Damages "reflecting the gravity of the infringement" are "of an exceptional nature ... given to the injured party over and above the actual loss, when the wrong done was aggravated by circumstances of violence, oppression, malice, fraud or wicked conduct on the part of the wrongdoing party".[331] Thus in the *Rainbow Warrior* case, the United Nations Secretary-General decided that France should formally apologise for the breach and pay US$ 7 million to New Zealand; this far exceeded the actual damage suffered and was plainly an award by way of satisfaction.[332] The commentary does not suggest that this mode of satisfaction is limited to "international crimes" as defined in former article 19. Even in relation to "delicts", satisfaction performs a function which, whether or not "afflictive" is expressive of the seriousness of the case and of the injury done, and in this sense is an aspect of full reparation.[333]

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[326] Commentary to article 45, para. (4), text in *Yearbook ... 1993*, vol. II (Part 2), pp. 76-81.

[327] *Ibid.*, para. (5).

[328] *Ibid.*, para. (6).

[329] *Ibid.*, para. (9).

[330] *Ibid.*, para. (10).

[331] *Ibid.*, para. (12).

[332] *Ibid.*, para. (13).

171. The sanctioning of responsible officials is also quite frequently sought and granted, but its "extensive application ... might result in undue interference in the internal affairs of States. [The commission] has therefore limited the scope of application of subparagraph (d) to criminal conduct whether from officials or private parties and to serious misconduct of officials".[334]

172. More generally it is necessary to impose some limit on the measures that can be sought by way of satisfaction, in light of earlier abuses, inconsistent with the principle of the equality of States.[335] This is the point of paragraph (3).[336]

173. None of the Governments which have commented on article 45 question its relevance and necessity: all support the view that satisfaction is an important and well-grounded form of reparation in international law.[337] The three paragraphs of the provision have nevertheless been subject to many remarks both of substance and form. As to paragraph 1, the main concern relates to the notion of moral damage. Japan comments that the words "in particular moral damage" are too unclear and should be deleted.[338] On the other hand, both Germany and the United States agree that reparation for moral damage is well established in State practice. But both Governments consider that "moral damage is equivalent to the harm of mental shock and anguish suffered and [that] reparation will regularly consist of monetary compensation": accordingly, the provision on moral damage should in their view be moved to article 44.[339]

174. As to paragraph 2, the first issue raised by Governments concerns the notion of "punitive damages", alluded to in paragraph 2 (c). Several Governments argue that the punitive function of reparation is not supported by State practice or international jurisprudence and propose deleting the related provision in article 45.[340] On the other hand, the Czech Republic believes

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[333] *Ibid.*, paras. (21)-(24).

[334] *Ibid.*, para. (15) (emphasis in original).

[335] The commentary does not give example of such abuses, but Mr. Arangio-Ruiz in his Second Report gives two: the joint note presented to the Chinese Government in 1900 following the Boxer uprising, and the demand by the Conference of Ambassadors against Greece in the Tellini affair in 1923: Second Report (1989), para. 124. Both examples involved collective demands.

[336] Commentary to article 45, para. (25).

[337] Mongolia describes article 45 as "highly important" (A/CN.4/488, p. 109).

[338] A/CN.4/492, p. 14 (see also A/CN.4/504, p. 19, para. 72, where it is suggested that the term "moral damage" be defined).

[339] A/CN.4/488, p. 110. The German Government draws a distinction between moral damage suffered by nationals of the State and that directly suffered by States: although "less compelling", the latter situation could also justify monetary compensation "as a form of satisfaction for infringements of the dignity of a State" (*ibid.*, p. 110).

that the Commission "could reconsider the question of punitive damages in respect of crimes".[341] Given the *sui generis* character of international responsibility, the absence of the notion of punitive damages in some national legal systems is not an insurmountable problem for the Czech Republic. In addition to the fact that punitive damages have been awarded in a few international cases, "it is not as a rule easy to distinguish between real punitive damages, that is, those that go beyond simple reparation, and a 'generous' award of compensation for mental suffering extensively evaluated".[342] Moreover, "[i]ntroducing the concept of punitive damages in the draft articles would make it possible to attribute to the regime for 'crimes' a valuable *a priori* deterrent function".[343]

175. States have also commented on the other provisions of article 45, paragraph 2. It has, for example, been suggested that the new forms of "constructive reparation" recognized in the *Rainbow Warrior* case could be included in that paragraph.[344] France proposes a number of other modifications.[345] In its view, a new subparagraph could be added "referring to acknowledgement of the existence of an internationally wrongful act by a tribunal"; it would read as follows:

> "a declaration of the wrongfulness of the act by a competent international body which is independent of the parties".

France also considers that the phrase "an expression of regret and" should be included before "an apology" in subparagraph (a),[346] and that the words "disciplinary or penal action against" should be substituted for "disciplinary action against, or punishment of," in subparagraph (d). In respect of that last sub-paragraph, opinions are rather divided: whereas it has been argued that it "covered a domestic concern regarding disciplinary action against officials which should not be

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[340] Germany (*ibid.*), Austria (calling for the Commission to study the issue further, given the existence of the concept in some domestic legal systems; *ibid.*, p. 111), United States (*ibid.*, p. 112), Japan (A/CN.4/492, p. 15). Switzerland suggests deleting paragraph 2 (c) on another ground, viz. the fact that it deals with issues of compensation, already covered by article 44 (A/CN.4/488, p. 112).

[341] A/CN.4/488, p. 111.

[342] *Ibid.*, p. 111 (the Czech Government questions the relevance in modern international law of the *Carthage* and *Lusitania* cases; see also A/CN.4/504, p. 20; para. 72).

[343] A/CN.4/488, p. 111.

[344] A/CN.4/504, p. 20, para. 72.

[345] A/CN.4/488, p. 112.

[346] Uzbekistan proposes a similar addition as well as the inclusion of the phrase "an expression of special honours to the injured State" *(ibid.*, p. 113).

covered in the draft articles".[347] Austria is of the view that it should better reflect recent State practice, and particularly the "growing number of multilateral instruments emphasizing the duty of States to prosecute or extradite individuals for wrongful acts defined in those instruments".[348]

176. Finally, the United States proposes deleting paragraph 3, on the ground that "the term 'dignity' is not defined (and may be extremely difficult to define as a legal principle) and therefore the provision would be susceptible to abuse by States seeking to avoid providing any form of satisfaction".[349]

177. Accordingly the questions raised by article 45 seem to be three, corresponding to its three paragraphs: first, the general character of satisfaction and its relation to "moral damage"; secondly, the exhaustive or non-exhaustive character of the forms of satisfaction given in paragraph (2), as well as certain issues as to the content of the list, and thirdly, the need for and formulation of paragraph (3).

(b) The character of satisfaction as a remedy

178. There is no doubt that satisfaction for non-material injury caused by one State to another is recognized by international law. The point was made, for example, by the Tribunal in the *Rainbow Warrior* arbitration:

> "There is a long established practice of States and international Courts and Tribunals of using satisfaction as a remedy or form of reparation (in the wide sense) for the breach of an international obligation. This practice relates particularly to the case of moral or legal damage done directly to the State, especially as opposed to the case of damage to persons involving international responsibilities. The whole matter is valuably and extensively discussed by Professor Arangio-Ruiz in his second report (1989) ... He demonstrates wide support in the writing as well as in judicial and State practice of satisfaction as 'the special remedy for injury to the State's dignity, honour and prestige' (para. 106). Satisfaction in this sense can take and has taken various forms. Arangio-Ruiz mentions regrets, punishment of the responsible individuals, safeguards against repetition, the payment of symbolic or nominal damages or of compensation on a broader basis, and a decision of an international tribunal declaring the unlawfulness of the State's conduct ... It is to the last of these forms of satisfaction for an international wrong that the Tribunal now turns. The Parties in the present case are agreed that in principle such a declaration of breach could be made - although France denied that it was in breach of its obligations and New Zealand sought as well a declaration and order of return. There is no doubt both that this power exists and that it is seen as a significant sanction."[350]

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[347] A/CN.4/504, p. 20, para. 72.

[348] A/CN.4/488, p. 111.

[349] *Ibid.*, p. 113; see also A/CN.4/504, p. 20, para. 72.

[350] *U.N.R.I.A.A.*, vol. XX (1990) p. 217 at pp. 272-3 (paras. 122-3).

179. According to the commentary to article 45, satisfaction "is not defined only on the basis of the type of injury with regard to which it operates as a specific remedy, it is also identified by the typical forms it assumes ..."[351] This is certainly true, but there is a problem in that paragraph (1) does not define satisfaction at all: it uses the term "satisfaction" and then refers in a general way to "damage, in particular moral damage" suffered by the injured State. This raises a number of issues.

180. The first is the term "moral damage", which some States regard as something properly the subject of compensation, particularly when it affects individuals.[352] In Mr. Arangio-Ruiz' original scheme, moral damage suffered by individuals was covered by draft article 8, whereas moral damage suffered by the State was covered by article 10 on satisfaction.[353] Though not rejected by the Commission, this distinction was elided when the articles were actually adopted.

181. So far as it concerns individuals, the term "moral damage" (a term itself not known to all legal systems) is generally understood to cover non-material damage such as pain and suffering, loss of loved ones, as well as the affront to one's sensibilities associated with an intrusion on one's person, home or private life. These are clear forms of human loss which (if the act causing them is recognized by the relevant legal system as wrongful) can be compensated for in monetary terms, even though their assessment will always be a conventional and highly approximate matter. By contrast, the notion of "moral damage" so far as it concerns States is less clear. No doubt there are cases of per se injury to States where no actual material loss is suffered - for example, a brief violation of its territorial integrity by aircraft or vessel belonging to another State. But much of what is subsumed under the term "moral damage" for States really involves what might be described as non-material legal injury, the injury involved in the fact of a breach of an obligation, irrespective of its material consequences for the State concerned. To avoid confusion with the notion of moral damage as it concerns individuals, it is proposed to avoid the term "moral damage" in article 45 and to use "non-material injury" ("*préjudice immatériel*") instead.[354] On this basis no more detailed definition of satisfaction seems to be required.

(c) Specific forms of satisfaction

182. Turning to the specific forms of satisfaction listed in paragraph (2), an initial point to note is that the commentary contradicts itself on the question whether the forms of satisfaction

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[351] Commentary to article 45, para. (9).

[352] Above, paragraph 173.

[353] See especially article 8, Alternative B, which referred to "any economically assessable damage ... including any moral damage suffered by the injured State's nationals": Second Report (1989) p. 56 (para. 191).

[354] The term is recommended in this sense by C. Dominicé, "De la réparation constructive du préjudice immatériel souffert par un État", in *L'Ordre Juridique International entre Tradition et Innovation. Recueil d'Études* (PUF, Paris, 1997) p. 349 at p. 354.

listed are or are not exhaustive. According to paragraph (9) the list is non-exhaustive, whereas according to paragraph (16), "[t]he opening phrase of paragraph 2 makes it clear that the paragraph provides an exhaustive list of the forms of satisfaction, which may be combined."[355] The point is of significance since the most important form of satisfaction in modern judicial practice, the declaration, is omitted from the list. In fact the chapeau of paragraph (2) uses the word "may", which seems to imply a non-exhaustive list. In the present Special Rapporteur's view it should indeed be non-exhaustive. The appropriate form of satisfaction will depend on the circumstances, and cannot be prescribed in advance.[356]

Declarations

183. If the paragraph (2) list were exhaustive, it is obvious that it would have to include reference to a declaration by a court or tribunal. Indeed such a reference was included in the version of article 45 first proposed by Mr. Arangio-Ruiz,[357] and France proposes an equivalent.[358] Both draw on the classic statement of the International Court in the *Corfu Channel Case (Merits)*, where the Court, after finding unlawful a mine-sweeping operation (Operation Retail) carried out by the British Navy after the explosion, said:

> "to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty. This declaration is in accordance with the request made by Albania through her counsel and is in itself appropriate satisfaction."[359]

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[355] In introducing article 45, the Chairman of the Drafting Committee also expressed the view that paragraph 2 "provided an exhaustive list of the forms of satisfaction": *Yearbook ... 1992*, vol. 1 p. 221 (para. 57).

[356] In the *Rainbow Warrior Arbitration* the Tribunal, while rejecting New Zealand's claims for restitution and/or cessation and declining to award compensation, made various declarations by way of satisfaction, and in addition a recommendation "to assist [the parties] in putting an end to the present unhappy affair". Specifically it recommended that France contribute US$ 2 million to a fund to be established "to promote close and friendly relations between the citizens of the two countries". See *U.N.R.I.A.A.*, vol. XX (1990) p. 217 at p. 274 (paras. 126-127). Quite apart from the fact that it was made *ultra petita*, it was appropriate that this take the form of a recommendation, since it could only be implemented by agreement. See further L. Migliorino, "Sur la déclaration d'illiceité comme forme de satisfaction: à propos de la sentence arbitrale du 30 avril 1990 dans l'affaire du Rainbow warrior", *Revue générale de droit international public*, vol. 96, 1992, p. 61.

[357] The original proposal contained the following paragraph:

> "3. A declaration of the wrongfulness of the act by a competent international tribunal may constitute in itself an appropriate form of satisfaction."

Second Report (1989) p. 56 (para. 191).

[358] Above, paragraph 175.

184. This position has been followed in many subsequent cases, including the *Rainbow Warrior* arbitration,[360] to such an extent that declaratory relief can be said to have become the normal, and certainly the first, form of satisfaction in the case of non-material injury to a State.[361] In saying that it is the first, the Special Rapporteur does not imply that it is primary, or that it excludes more stringent forms of satisfaction where these are justified. Declaratory relief, however, comes first in two senses: (a) that in some cases it may be a sufficient form of satisfaction (as it was in relation to Operation Retail in *Corfu Channel*); (b) that even where it is not sufficient, it is a necessary basis for other forms of satisfaction which may be called for in particular cases. This general applicability of declaratory relief as a form of satisfaction, associated in appropriate cases with an apology or statement of regret, should be recognized in the Draft articles, which could usefully distinguish it from the more specific forms of reparation currently listed in paragraph (2).

185. The difficulty with doing so, however, is that the Draft articles are expressed in terms of the legal relations of States, in particular the responsible State, and not in terms of the powers or jurisdiction of tribunals. A State cannot, as it were, grant or offer a declaration in respect of itself; this can only be done by a competent third party. A statement of the breach of an international obligation made by the injured State is a claim; made by the responsible State, it is an acknowledgement. The Draft articles should specify what the responsible State should do in consequence of an internationally wrongful act (i.e. its secondary obligations); what it fails to do a competent tribunal would then be entitled to award by way of reparation. Accordingly article 45 should first specify, as a form of satisfaction, the acknowledgement of the breach and, where appropriate, an apology or expression of regret.

Nominal, exemplary and punitive damages

186. Turning to what may be described as the "second tier" of the forms of satisfaction, for the reasons given, these should be formulated in a non-exhaustive way. There are very many other possibilities, including for example, a proper inquiry into the causes of an accident causing harm or injury, a trust fund to manage compensation payments in the interests of the beneficiaries, etc. But something should be said about the two categories that are mentioned in article 45, damages and disciplinary or penal action.

187. Normally, of course, damages are payable by way of compensation for injury or harm suffered, and fall within article 44. Article 45 (2) presently mentions two other kinds of damage, viz., nominal damages and damages "reflecting the gravity" of a breach. They present very different issues.

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[359] *I.C.J. Reports* 1949 p. 4 at p. 35, repeated in the *dispositif* at p. 36. This was the only point on which the Court was unanimous.

[360] See above, paragraph 178.

[361] On the primary role of declaratory relief as satisfaction for non-material injury see e.g. C. Gray, *Judicial Remedies in International Law* (Oxford, Clarendon Press, 1987) pp. 17-18 (arbitral tribunals), 96-107 (International Court), 127-131 (European Court of Justice), 155-6 (human rights courts).

188. Nominal damages are awarded in some systems in order to reflect the existence of a breach which has not been shown to have caused the injured party any loss whatever. Nonetheless, there has been a breach and the nominal damages are intended to reflect that: they are symbolic, not compensatory. In legal systems where the award of costs follows the event, an award of nominal damages may allow for the award of costs, but in international arbitral and judicial practice it would not do so, since costs are almost always borne by each party and in any event would not depend on whether an award of US$ 1 (• 1.0734) had been made. There is also the point that the award of nominal damages was sometimes intended as an *adverse* reflection on the claimant, implying that the claim had no merit and was purely technical.[362] Although there have occasionally been examples of the award of nominal damages by international tribunals, in modern practice these are rare.[363] The present Special Rapporteur doubts the value of nominal damages as a form of satisfaction in modern international law: in particular it is not clear what they could achieve which could not be achieved by appropriate declaratory relief. Assuming that the proposed additional paragraph will be inclusive, he doubts whether nominal damages need to be specifically mentioned.

189. The award of substantial damages by way of satisfaction, even in the absence of any proof of material loss, is another matter, and circumstances can readily be envisaged where this would be appropriate.[364] By "substantial damages" is meant any damages not purely nominal or symbolic, even if they are not large. Article 45 (2) (c) envisages "in cases of gross infringement of the rights of the injured State, [the payment of] damages reflecting the gravity of the infringement". It seems that it did not envisage the payment of any other than nominal damages by way of satisfaction in cases not involving gross infringements: in other words, either trivial

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[362] See D.M. Walker, *The Oxford Companion to Law* (Oxford, Clarendon Press, 1980) p. 883. Awards such as $500 for 24 hours' imprisonment, or $100 for the brief detention of a vessel, do not constitute nominal damages in this sense, especially having regard to the value of money at the time. See respectively the *Moke* case, decision of 16 August 1871, Moore, *International Arbitrations*, vol. IV, p. 3411; the *Arends* case, *U.N.R.I.A.A.* vol. X, p. 729 at pp. 729-30 (1956), as cited by Arangio-Ruiz, Second Report (1989) p. 35 (para. 115).

[363] See Gray (1987) pp. 28-29 and references. There seems to have been no case of the award of nominal damages by an international tribunal in a State-to-State case since the Tribunal awarded 1 FF to France in the *Lighthouses Arbitration*: *U.N.R.I.A.A.* vol. XII, p. 155 at p. 216 (1956). Nominal damages were awarded by an ICSID Tribunal in *AGIP Spa v. Government of the Popular Republic of the Congo* (1979) 1 ICSID Reports 306 at p. 329 (3 FF in respect of *lucrum cessans*, which seems a contradiction in terms), and by the European Court of Human Rights in the *Engel case (Article 50)* ECHR Ser. A vol. 22 at p. 69 (1976) (a "token indemnity" of DFl 100). In both these cases substantial sums were awarded under other heads. In other cases tribunals have denied that the award of notional sums added anything to a declaration of a breach: *The Carthage*, *U.N.R.I.A.A.* vol. XI, p. 449 at pp. 460-1 (1913); *The Manouba*, *U.N.R.I.A.A.* vol. XI, p. 463 at p. 475 (1913).

[364] Such damages were awarded to Canada in *The I'm Alone*, *U.N.R.I.A.A.*, vol. III, p. 1609 (1935), and to New Zealand in the Secretary-General's award in *Rainbow Warrior*, *U.N.R.I.A.A.*, vol. XX, p. 224 (1986).

amounts of damages can be awarded under the rubric of satisfaction, or very large amounts, but nothing in between. Whether this limitation is appropriate depends, in part at least, on whether paragraph (2) (c) is really concerned with punitive damages properly so-called, or whether it focuses on what some national legal systems describe as "aggravated" or "exemplary" damages.

190. Mr. Arangio-Ruiz' Second Report was clear on the point. His proposed article 10 referred to "nominal or punitive damages", although the Report itself rather refers to "afflictive damages".[365] In the present Special Rapporteur's view, if there are to be punitive damages properly so-called, they should be called punitive damages, and they should be available - if at all - only in rare cases of manifest and egregious breach. It may be that the language of subparagraph (c) is equivocal in this respect, but the intention is clear. According to the Chairman of the Drafting Committee, that subparagraph was intended to deal ...

> "with what was known in the common law as 'exemplary damages', in other words, damages on an increased scale awarded to an injured party over and above the actual loss, where the wrong done was aggravated by circumstances of violence, oppression, malice, fraud or wicked conduct on the part of the wrongdoing party. The purpose of that type of remedy was to set an example. The Drafting Committee had not used the term 'exemplary damages' because the term did not seem to have an equivalent in other languages. It had decided instead to spell out the content of the concept ... The words 'in cases of gross infringement' was intended to [set] a high threshold for availability of that type of satisfaction."[366]

By clear inference the Committee (whose approach the Commission endorsed) rejected the concept of punitive damages for the purposes of article 45.[367] To that extent the present Special Rapporteur fully agrees with the position taken in 1992. There is no authority and very little justification for the award of punitive damages properly so-called, in cases of State responsibility, in the absence of some special regime for their imposition.[368] Whether such a regime can and should be established is a matter for consideration in discussing articles 19 and 51-53.

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[365] Second Report (1989) p. 56 (para. 191). See also pp. 40-41.

[366] *Yearbook ... 1992*, p. 221 (para. 57).

[367] The availability of punitive damages is not one of the special consequences of "international crimes" in Chapter IV of Part 2, either, as the present Special Rapporteur has pointed out: Crawford, First Report (A/CN.4/490/Add.1, 1998) para. 51.

[368] See the cases cited in the First Report (1998), para. 63. See further S. Wittich, "Awe of the Gods and Fear of the Priests: Punitive Damages in the Law of State Responsibility", *Austrian Review of International and European Law*, vol. 3, 1998, p. 31; N. Jorgensen, "A Reappraisal of Punitive Damages in International Law", *British Yearbook of International Law*, vol. 68, 1997, p. 247.

191. The question is therefore whether damages should be payable by way of satisfaction for non-pecuniary injury to States, in cases not involving "gross infringement". There are certainly examples in the past of tribunal awards, and of agreed settlements, where modest but not nominal sums have been paid for non-pecuniary injury, and the Special Rapporteur can see no reason to exclude such cases *a priori*. He therefore proposes to delete the phrase "in cases of gross infringement" in present subparagraph (c).

Disciplinary or other action against individuals

192. Disciplinary or penal action is a further specific form of satisfaction mentioned in paragraph (2) which may be appropriate in special cases. Although the Drafting Committee in adopting the paragraph expressed the view that these would be "rare",[369] in practice they have occurred, although it may not always be clear whether prosecution of criminal conduct was sought by way of satisfaction or as an aspect of performance of some primary obligation. It is consistent with established conceptions of satisfaction to include this category in serious cases, but the Special Rapporteur agrees with the suggestion of the French Government that the phrase "disciplinary or penal action" is to be preferred to "disciplinary action ... or punishment ..." Consistently with the separation of powers, the executive government of the State cannot properly do more than undertake that a serious case be duly submitted to its prosecution authorities for the purposes of investigation and prosecution; it certainly cannot guarantee the punishment of persons not yet convicted of any crime.

(d) Limitations upon satisfaction: article 45 (3)

193. One Government proposes the deletion of paragraph (3),[370] on the grounds *inter alia* that the notion of "dignity" is too vague to be the basis of a legal restriction. There is some point to the objection as a matter of expression; on the other hand there has been a history of excessive demands made under the guise of "satisfaction",[371] and some limitation seems to be required. It is proposed that demands by way of satisfaction should be limited to measures "proportionate to the injury in question"; in addition they should not take a form which is humiliating to the State concerned.

(e) Conclusion on article 45

194. For these reasons the Special Rapporteur proposes the following version of article 45:

"*Satisfaction*

1. The State which has committed an internationally wrongful act is obliged to offer satisfaction for any non-material injury occasioned by that act.

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[369] *Yearbook ... 1992*, p. 221 (para. 59).

[370] See above, paragraph 176.

[371] See e.g. above, paragraph 172, note 124. These excessive demands themselves used the unsatisfactory and subjective language of the "dignity" of the injured State.

2. In the first place, satisfaction should take the form of an acknowledgement of the breach, accompanied, as appropriate, by an expression of regret or a formal apology.

3. In addition, where circumstances so require, satisfaction may take such additional forms as are appropriate to ensure full reparation, including, *inter alia*:

[(a) nominal damages;]

(b) damages reflecting the gravity of the injury;

(c) where the breach arose from the serious misconduct of officials or from the criminal conduct of any person, disciplinary or penal action against those responsible.

4. Satisfaction must be proportionate to the injury in question and should not take a form humiliating to the responsible State."

5. Interest

(a) The question of interest in the draft articles

195. Article 44 (2) deals fleetingly with interest. It says only that "compensation ... may include interest ..." The commentary to article 44 (2) is a little more expansive, reflecting the more substantial treatment given to the issue by Mr. Arangio-Ruiz in his Second Report.[372] There he had supported a general rule of entitlement to interest, covering the time from which the claim arose until the time of actual payment, and not limited to claims for a liquidated sum. Furthermore, in his view, compound interest "should be awarded whenever it is proved that it is indispensable in order to ensure full compensation for the damage suffered by the injured State".[373] On the other hand his proposed article 9 on interest did not state any general rule of entitlement to simple (as distinct from compound) interest, and was limited to specifying the period of time to be covered by interest due "for loss of profits ... on a sum of money".[374] This

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[372] Second Report (1989) pp. 23-20 (paras. 77-105).

[373] *Ibid.*, p. 30 (para. 105).

[374] *Ibid.*, p. 56. His proposed article read:

"1. Where compensation due for loss of profits consists of interest on a sum of money, such interest:

(a) shall run from the first day not considered, for the purposes of compensation, in the calculation of the amount awarded as principal;

(b) shall run until the day of effective payment.

implied that interest payments were limited to liquidated claims, and even, perhaps, to claims for loss of profits (although this may have been a matter of expression only). If the basic principle is, however, that an injured State is entitled to interest on a claim to the extent necessary to ensure full reparation, it is not clear how such limitations can be justified *a priori*.

196. In the first reading debate, the discrepancy between the argument in favour of interest in the Report and proposed article 9 was pointed out, and concerns were expressed as to the acceptability of a detailed treatment of the issues covered.[375] The Drafting Committee deleted the article, on the ground that "it would be extremely difficult to arrive at specific rules on such issues that would command a large measure of support". In its view, it was sufficient "to state a general principle, couched in quite flexible terms, and leave it to the judge of the third party involved in the settlement of the dispute to determine in each case whether interest ... should be paid".[376]

197. Article 44 (2) is certainly drafted in "quite flexible" terms; the difficulty with it is that it states no "general principle" of any kind, but merely refers to a possibility. According to the commentary, the language was intended to make it "clear that there is no automatic entitlement to the payment of interest and no presumption in favour of the injured State",[377] although it notes that State practice "seems to be in support of awarding interest in addition to the principal amount of compensation".[378] The Drafting Committee evidently sought to draw a distinction in the language of paragraph (2) between the award of interest and of damages for loss of profit. Since the latter is only available "where appropriate", the inference is that interest should be more generally available.[379] But the inference is neither strong nor persuasive; all the article says is that compensation "may" include interest. However the commentary is on stronger

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2. Compound interest shall be awarded whenever necessary in order to ensure full compensation, and the interest rate shall be the one most suitable to achieve that result."

[375] *Yearbook ... 1990*, vol. I, pp. 149-50, 153, 156, 158, 161, 166-7, 169, 172, 175, 177, 178-9, 183, 184, 187, 188-9, 190, 190-1, 193, 199. To judge from the debate, the Commission would have been willing to accept a proposal focusing on the *general* entitlement to interest as necessary to provide full reparation, but was concerned that proposed article 9 "dealt only with a secondary problem", on which there was a divergence of practice: *ibid.*, p. 156 (para. 10) (Mr. Tomuschat); cf. *ibid.*, p. 158 (para. 10) (Mr. Ogiso: "too detailed rules on such issues as the rate of interest and compound interest, on which international law was not clear").

[376] *Yearbook ... 1992*, vol. I, p. 220 (para. 48).

[377] Commentary to article 44, para. (24).

[378] *Ibid.*, para. (25).

[379] *Yearbook ... 1992*, vol. I, p. 220 (para. 49) (Mr. Yankov, Chairman of the Drafting Committee).

ground in expressing the view "that the determination of dies a quo and dies ad quem in the calculation of interest, the choice of the interest rate and the allocation of compound interest are questions to be solved on a case-by-case basis".[380]

198. As noted in paragraph 152 above, some Governments supported the rather reticent treatment of the topic of interest in article 44 (2); others were strongly critical, noting that it tended to destabilize the established principle that interest should be awarded where necessary to compensate an injured party for loss arising from an internationally wrongful act. In this context it should be noted that neither the Special Rapporteur nor any member of the Commission in the first reading debate denied that principle; indeed almost all who spoke on the subject specifically supported it.

(b) The role of interest in relation to reparation[381]

199. Having regard to the comments made by Governments and to other criticisms of the Draft articles, two questions arise. The first is the actual role of awards of interest as an aspect of reparation for an internationally wrongful act; the second is whether it is desirable to include a provision concerning interest in the Draft articles.

A general principle?

200. Turning to the first question, Mr. Arangio-Ruiz' Second Report contains a useful review of precedents and doctrine. The existence of at least a general rule favouring the award of interest where necessary to achieve full reparation is also supported by more recent jurisprudence.

201. It should be noted that on the first (as it turned out, the only) occasion on which the Permanent Court actually quantified the compensation due for an international wrong, it included an award of interest. In *The Wimbledon*, the Court awarded simple interest at 6 per cent as from the date of judgement, apparently on the basis that interest was only payable "from the moment when the amount of the sum due has been fixed and the obligation to pay has been established".[382] Although compensation was quantified by reference to

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[380] Commentary to article 44, para. (26).

[381] On interest as a matter of general international law see e.g. I. Brownlie, *State Responsibility Part I* (Oxford, Clarendon Press, 1983) pp. 227-229; J. Barker, "The Valuation of Income Producing Property in International Law" (University of Cambridge, PhD thesis, 1998), ch. 7 and works there cited. On the comparative and private international law experience see e.g. M. Hunter and V. Triebel, "Awarding Interest in International Arbitration" (1989) 6 *Journal of International Arbitration* p. 7; J.Y. Gotanda, "Awarding Interest in International Arbitration" (1996) 90 *AJIL* 40; J.Y. Gotanda, *Supplemental Damages in Private International Law* (Kluwer, The Hague, 1998), chs. 2-3.

the actual costs of diversion of the French ship, this was a public law claim for breach of a treaty.[383] In the *Corfu Channel Case (Assessment of Compensation)*,[384] another State-to-State claim, no question of interest was raised.

202. Issues of the award of interest have frequently arisen in other tribunals, both in cases where the underlying claim involved injury to private parties and in cases of interstate claims properly so-called.[385] In this respect the experience of the Iran-United States Claims Tribunal is worth noting.[386] In *Islamic Republic of Iran v. United States of America (Case A-19)*, the Full Tribunal held that its general jurisdiction to deal with claims included the power to award interest, but it declined to lay down uniform standards for the award of interest on the ground that this fell within the jurisdiction of each Chamber and related "to the exercise of the discretion accorded to them in deciding each particular case".[387] On the issue of principle the Tribunal said:

> "Claims for interest are part of the compensation sought and do not constitute a separate cause of action requiring their own independent jurisdictional grant. This Tribunal is required by Article V of the Claims Settlement Declaration to decide claims 'on the basis of respect for law'. In doing so, it has regularly treated interest, where sought, as forming an integral part of the 'claim' which it has a duty to decide. The Tribunal notes that the Chambers have been consistent in awarding interest as 'compensation for damages suffered due to delay in payment'... Indeed, it is customary for arbitral tribunals to award interest as part of an award for damages, notwithstanding the absence of any express reference to interest in the *compromis*. Given that the power to award interest is

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[382] *P.C.I.J.*, Ser. A No. 1 (1923) at p. 32. The Court accepted the French claim for an interest rate of 6 per cent as fair, having regard to "the present financial conditions of the world and ... the conditions prevailing for public loans".

[383] The Permanent Court also envisaged interest as payable in the *Chorzów Factory Claim (Merits)* P.C.I.J., Ser. A No. 17 (1928) p. 17 ("an amount equivalent to interest at 5 per cent per annum from the date of the taking to the date of payment"). No award was actually made since the amount of compensation was subsequently agreed between the parties.

[384] *I.C.J. Reports*, 1949 p. 244.

[385] In its first case on assessment of compensation, the International Tribunal on the Law of the Sea awarded interest at different rates in respect of different categories of loss: see *The M.V. Saiga (No. 2)*, judgement of 1 July 1999, para. 173; reprinted at 38 I.L.M. 1323 (1999).

[386] See G.H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996) pp. 474-479; C.N. Brower and J.D. Brueschke, *The Iran-United States Claims Tribunal* (Nijhoff, The Hague, 1998) ch. 18.

[387] (1987) 16 Iran-US Claims Tribunal Reports 285 at p. 290. As Aldrich (1996) pp. 475-6 points out, the practice of the three Chambers has not been entirely uniform.

> inherent in the Tribunal's authority to decide claims, the exclusion of such power could only be established by an express provision in the Claims Settlement Declaration. No such provision exists. Consequently, the Tribunal concludes that it is clearly within its power to award interest as compensation for damage suffered."[388]

The Tribunal has awarded interest at a different and slightly lower rate in respect of intergovernmental claims.[389] It has not awarded interest in certain cases, for example where a lump-sum award was considered as reflecting full compensation, or where other special circumstances pertained.[390]

203. Decision 16 of the Governing Council of the United Nations Compensation Commission deals with the question of interest. It provides:

> "1. Interest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award.
>
> 2. The methods of calculation and of payment of interest will be considered by the Governing Council at the appropriate time.
>
> 3. Interest will be paid after the principal amount of awards."[391]

Again we see the combination of a decision in principle in favour of interest where necessary to compensate a claimant, with flexibility in terms of the application of that principle; at the same time, interest, while a form of compensation, is regarded as a secondary element, subordinated to the principal amount of the claim.

204. Awards of interest are also sometimes made, or at least envisaged, by human rights courts and tribunals, even though the compensation practice of these bodies is relatively

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[388] (1987) 16 Iran-US Claims Tribunal Reports 285 at pp. 289-90.

[389] See Brower and Brueschke (1998) pp. 626-7, with references to the cases. The rate adopted was 10 per cent, as compared with 12 per cent for commercial claims.

[390] See Aldrich (1996) at pp. 476-77. And see the detailed analysis of Chamber Three (Virally, Brower, Ansari) in *McCollough & Co. Inc. v. Ministry of Post, Telegraph & Telephone & others* (1986) 11 Iran-US CTR 3 at pp. 26-31.

[391] S/AC.26/1992/16, "Awards of Interest", 4 January 1993.

conservative and the claims are almost always unliquidated. This is done, for example, to protect the value of a damages award payable by instalments over time, i.e. it takes the form of moratory interest.[392]

205. In their more recent practice, national compensation commissions and tribunals have also generally allowed for interest in assessing compensation. However in certain cases of partial lump-sum settlements, claims have been expressly limited to the amount of the principal loss, on the basis that with a limited fund to be distributed, claims to principal should take priority.[393]

206. Although the trend is towards greater availability of interest as an aspect of full reparation, even proponents of awards of interest admit that there is no uniform approach, internationally, to questions of quantification and assessment of the amount of interest actually awarded.[394] Thus, according to Gotanda:

> "Among international tribunals, there exists no uniform approach for awarding interest. As a result, interest awards have varied greatly. There has been little agreement on the circumstances warranting the payment of interest, and the rates at which interest has been awarded have varied from 3 per cent to 20 per cent."[395]

The question of compound interest

207. An aspect of the question of interest is the possible award of compound interest. At least as a matter of progressive development, Mr. Arangio Ruiz favoured the award of compound interest "whenever it is indispensable to ensure full compensation for the damage suffered by the

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[392] See e.g. *Velásquez Rodriguez (Compensation) Case* IACHR Series C, No. 71 (1989) para. 57. The European Court of Human Rights now adopts a similar approach: see e.g. *Papamichaelopoulos v. Greece (Article 50)* ECHR Ser A. vol. 330-B (1995) para. 39. In that case interest was payable only in respect of the pecuniary damage awarded. See further Shelton (1999) pp. 270-2.

[393] Barker (1998) pp. 209, 237-8. See e.g. the Foreign Compensation (People's Republic of China) Order 1987 (U.K.), s. 10, giving effect to a Settlement Agreement of 5 June 1987: U.K.T.S. No. 37 (1987).

[394] It should be noted that a number of Islamic countries, influenced by the *Shari'a*, prohibit payment of interest under their own law or even under their constitution. However, they have developed alternatives to interest in the commercial and international context. For example payment of interest is prohibited by the Iranian Constitution, Principles 43, 49, but the Guardian Council has held that this injunction does not apply to "foreign governments, institutions, companies and persons, who, according to their own principles of faith, do not consider [interest] as being prohibited..." See Gotanda (1998) pp. 39-40, with references.

[395] Gotanda (1998) 13 (references omitted).

injured State".[396] The Commission did not, however, retain his proposal to that effect, and the commentary says only that questions of compound interest are "to be solved on a case-by-case basis".[397]

208. In fact the general view of courts and tribunals has been against the award of compound interest, and this is true even of those tribunals which hold claimants to be normally entitled to compensatory interest. For example the Iran-United States Claims Tribunal has consistently denied claims for compound interest, including in cases where the claimant suffered losses through compound interest charges on indebtedness associated with the claim. In *J.R. Reynolds Tobacco Co. v Government of the Islamic Republic of Iran*, the Tribunal failed to find...

> "any special reasons for departing from international precedents which normally do not allow the awarding of compound interest. As noted by one authority, '[t]here are few rules within the scope of the subject of damages in international law that are better settled than the one that compound interest is not allowable'... Even though the term 'all sums' could be construed to include interest and thereby to allow compound interest, the Tribunal, due to the ambiguity of the language, interprets the clause in the light of the international rule just stated, and thus excludes compound interest."[398]

Consistent with this approach the Tribunal has read down contractual provisions appearing to provide for compound interest, in order to prevent the claimant gaining a profit "wholly out of proportion to the possible loss that [it] might have incurred by not having the amounts due at its disposal."[399]

209. The preponderance of authority thus continues to support the view expressed by Arbitrator Huber in the *Spanish Zone of Morocco* case:

> "the arbitral case law in matters involving compensation of one State for another for damages suffered by the nationals of one within the territory of the other - after

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[396] Second Report, *Yearbook ... 1989*, vol. II, part 2, p. 30 (para. 105).

[397] Commentary to article 44, para. (26).

[398] (1984) 7 Iran-U.S. C.T.R. 181 at pp. 191-2, citing M. Whiteman, *Damages in International Law* (Washington, 1943) vol. 3, p. 1997.

[399] *Anaconda-Iran, Inc. v. Government of the Islamic Republic of Iran* (1986) 13 Iran-U.S. C.T.R. 199 at p. 235. See also Aldrich (1996) pp. 477-478.

> all a particularly rich case law - is unanimous... in disallowing compound interest. In these circumstances, very strong and quite specific arguments would be called for to grant such interest ..."[400]

The same is equally true for compound interest in respect of State-to-State claims.

210. Nonetheless several authors (notably F.A. Mann) have argued for a reconsideration of this principle, on the ground that "compound interest reasonably incurred by the injured party should be recoverable as an item of damage".[401] This view has also been supported by an ICSID Tribunal in the recent case *Compañía des Desarrollo de Santa Elena SA v. Republic of Costa Rica*.[402]

> "... while simple interest tends to be awarded more frequently than compound, compound interest certainly is not unknown or excluded in international law. No uniform rule of law has emerged from the practice in international arbitration as regards the determination of whether compound or simple interest is appropriate in any given case. Rather, the determination of interest is a product of the exercise of judgment, taking into account all of the circumstances of the case at hand and especially considerations of fairness which must form part of the law to be applied by this Tribunal.
>
> In particular, where an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then became due to him, the amount of compensation should reflect, at least in part, the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest. It is not the purpose of compound interest to attribute blame to, or to punish, anybody for the delay in the payment made to the expropriated owner, it is a mechanism to ensure that the compensation awarded the Claimant is appropriate in the circumstances.

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[400] *U.N.R.I.A.A.*, vol. 2, p. 615 at p. 650 (1924), cited by Arangio-Ruiz, *Second Report* (1989) para. 101. The Report cites several later cases in which awards of compound interest were made or at least not ruled out in principle. A more recent example is the *Aminoil* arbitration, where the interest awarded was compounded for a period without any reason being given. This accounted for 15 per cent of the total final award: Barker (1998) p. 233, n. 119. See *Government of Kuwait v. American Independent Oil Co.* (1982) 66 I.L.R. 519 at p. 613 (Reuter, Sultan, Fitzmaurice).

[401] F.A. Mann, "Compound Interest as an Item of Damage in International Law", in *Further Studies in International Law* (Oxford, Clarendon Press, 1990) p. 377 at p. 383. With characteristic enthusiasm, Mann argues that this proposition "should not only be English law, but should be accepted wherever damages are allowed and should, therefore, be treated as a general principle of law": *ibid.* See also Gotanda (1996) p. 61, proposing quarterly compounding (again, *de lege ferenda*).

[402] ICSID Case No. ARB/96/1, final award of 1 February 2000 (Fortier, Lauterpacht, Weil).

> In the instant case, an award of simple interest would not be justified, given that ... for almost twenty-two years, [Claimant] has been unable either to use the Property for the tourism development it had in mind when it bought Santa Elena or to sell the Property. On the other hand, full compound interest would not do justice to the facts of the case, since [Claimant] while bearing the burden of maintaining the property, has remained in possession of it and has been able to use and exploit it to a limited extent."[403]

In fact the Tribunal awarded a lump sum by way of compensation for property affected by measures taken 23 years earlier. Moratory interest was awarded on a simple interest basis after a short grace period to pay.

211. To summarize, although compound interest is not generally awarded under international law or by international tribunals, special circumstances may arise which justify some element of compounding as an aspect of full reparation. Care is however needed since allowing compound interest could result in an inflated and disproportionate award, with the amount of interest greatly exceeding the principal amount owed.

Issues of interest rate and the period of account

212. The third question relates to the actual calculation of interest: this raises a complex of issues concerning the starting date (date of breach, date on which payment should have been made, date of claim or demand), the terminal date (date of settlement agreement or award, date of actual payment) as well as the applicable interest rate (rate current in the respondent State, in the applicant State, international lending rates). As noted already, there is no uniformity at present in the treatment of these issues. In practice the circumstances of each case and the conduct of the parties strongly affect the outcome. Although Mr. Arangio-Ruiz' proposed article 9 took the date of the breach as the starting date for calculation of the interest term, there may be difficulties in determining that date, and many legal systems require a demand for payment by the claimant before interest will run.[404] In any event, the failure to make a timely claim for payment is relevant in deciding whether or not to allow interest. As to moratory (post-award) interest, some cases allow a grace period for payment (of the order of 6 weeks up to 3 months), before interest begins to run, others do not. There is much wisdom in the Iran-United States Claim Tribunal's observation that such matters, if the parties cannot resolve them, must be left "to the exercise of the discretion accorded to [individual tribunals] in deciding each

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[403] Unpublished award, paras. 103-105.

[404] The date of formal demand was taken as the relevant date by the Permanent Court of Arbitration in the *Russian Indemnity* case, *U.N.R.I.A.A.*, vol. 11 p. 421 at p. 442 (1912), by analogy from the general position in European municipal law systems.

particular case".[405] On the other hand the present anarchical state of the decisions and of practice suggests that it may be useful to establish a presumption which would apply unless the parties otherwise agree or there are specific considerations pointing the other way.

(c) A provision on interest?

213. The Special Rapporteur agrees with the criticism that article 44 (2) as currently formulated does not reflect present international law with respect to compensatory interest. In principle, an injured State is entitled to interest on the principal sum representing its loss, if that sum is quantified as at an earlier date than the date of the settlement of, or judgment or award concerning, the claim and to the extent necessary to ensure full reparation.[406] Though an aspect of compensation, this entitlement is treated in practice as a separate element of damages, and this alone suggests that it should be reflected as a separate article in Chapter II. The article should not be limited (as Mr. Arangio-Ruiz' proposal was apparently limited) to amounts awarded by way of loss of profits. In the present state of the authorities, it is, however, too much to suggest that there is any entitlement to compound interest. The commentary should note that in special circumstances an award of compound interest may be made, to the extent necessary to provide full reparation. The commentary should also make it clear that the proposed article deals only with compensatory interest. The power of a court or tribunal to award moratory (post-judgment) interest is better regarded as a matter of its procedure, and is thus outside the scope of the Draft articles.

214. Accordingly the Special Rapporteur proposes the following article 45 bis:

Interest

1. Interest on any principal sum payable under these draft articles shall also be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be those most suitable to achieve that result.

2. Unless otherwise agreed or decided, interest runs from the date when compensation should have been paid until the date the obligation to pay compensation is satisfied.

6. Mitigation of responsibility

215. Turning from the question of the extent of responsibility to its mitigation, two questions arise. One, dealt with in article 42 (2) as adopted on first reading, concerns cases where the State

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[405] (1987) 16 Iran-US C.T.R. 285 at p. 290; above, paragraph 202.

[406] Thus interest may not be allowed where the loss is assessed in current value terms as at the date of the award. See the *Lighthouses* arbitration, (1950) 23 I.L.R. 659 at p. 676.

invoking responsibility has itself materially contributed to the loss suffered. The second concerns cases where, although that loss may be attributable to the responsible State, the former State has failed to take steps reasonably available to it to mitigate its loss.

(a) Contributory fault

216. What is now article 42 (2) deals with contributory fault and mitigation.[407] It is not appropriate to place it, alongside article 42 (1), as a general principle in Chapter I, but it does need to be dealt with as a qualification to the forms of reparation in Chapter II.

217. Article 42 (2) provides as follows:

> "2. In the determination of reparation, account shall be taken of the negligence or the wilful act or omission of:
>
> (a) the injured State; or
>
> (b) a national of that State on whose behalf the claim is brought;
>
> which contributed to the damage."

218. What is now article 42 (2) was originally proposed by Mr. Arangio-Ruiz specifically in the context of reparation by equivalent, i.e. compensation. One of his alternatives contained a provision allowing for compensation to be reduced in the case of concurrent causes "including possibly the contributory negligence of the injured State".[408] The Drafting Committee rejected his theory of concurrent causes, but maintained the specific provision dealing with contributory fault, on the ground that it was equitable that this be taken into account in determining the form and extent of the obligation of reparation.[409]

219. The commentary to article 42 (2) notes that contributory fault is "widely recognized both in doctrine and in practice as relevant to the determination of reparation".[410] This is particularly so in the context of compensation, but it is also relevant to other forms of reparation

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[407] The subject has not been much discussed in the literature, but see D.J. Bederman, "Contributory Fault and State Responsibility", *Virginia Journal of International Law*, vol. 30, 1990, pp. 335-369; J. Salmon, "La place de la faute de la victime dans le droit de la responsabilité internationale", in *International Law at the Time of its Codification. Essays in honour of Roberto Ago* (Giuffré, Milan, 1987) vol. iii, pp. 371-397.

[408] See Arangio-Ruiz, Second Report (1989) p. 56, and for his discussion see *ibid.*, pp. 15-16.

[409] See// *Yearbook...1992*, vol. I, p. 217 (paras. 20-26).

[410] Commentary to article 42, para. (7), with references to authorities; text in *Yearbook ... 1993*, vol. II (Part 2), p. 59.

and even possibly to the choice between them.[411] It notes that the phrase "the negligence or the wilful act or omission ... which contributed to the damage" is borrowed from article VI (1) of the Convention on International Liability for Damage caused by Space Objects.[412]

220. Those governments which have specifically commented on article 42 (2)[413] do not expressly call for its deletion but are generally concerned by the drafting and the underlying conceptions of the provision. While it agrees that the factors taken into account in article 42 (2) "are not themselves controversial", the United Kingdom wonders why negligence and wilful conduct are singled out; other elements, such as "[t]he nature of the rule that has been violated and of the interest that it is intended to protect" also deserve express mention. In view of the fact that the provision applies to reparation and not merely to compensation, the British government is "concerned that this reference to what appears to be a doctrine of contributory fault or negligence is attempting to settle as a general principle of State responsibility a question that is properly an aspect of particular substantive rules of international law".[414] The United States also questions the intent of article 42 (2). In its view, it is unclear whether the provision embodies "a concept of contributory negligence, which under a common law approach might completely negate the responsibility of the wrongdoer, or whether it foresees some partial deviation from the 'full reparation' standard".[415] For the United States, the former concept would be unacceptable. As to the adoption of a "comparative fault principle", the United States considers that it would introduce in the Draft articles an imprecise standard, not established in the existing law of State responsibility and "susceptible to abuse by the wrongdoing State".[416] At the same time, that government "appreciates the difficulties posed by the circumstance where an injured State or national bears some responsibility for the *extent* of his damages"[417] and acknowledges that an

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[411] *Ibid.*

[412] *Ibid.* For the Convention of 29 March 1972 see *United Nations Treaty Series*, vol. 961 p. 188. Under article VI (1) the launching State is exonerated from liability for damage "to the extent that [it] establishes that the damage has resulted either wholly or partially from gross negligence or from an act or omission done with intent to cause damage on the part of a claimant State or of natural or juridical persons it represents". Quite apart from the burden of proof, this represents a stricter standard of exoneration than article 42 (2), albeit in the context of a regime of strict liability for an ultra-hazardous activity.

[413] For the summary of comments by governments on article 42, see above, paragraph 22.

[414] A/CN.4/488, p. 104.

[415] *Ibid.*, p. 104.

[416] *Ibid.*, p. 105. See also A/CN.4/496, p. 19, para. 125 and the comments by Japan, according to which article 42 (2) should clearly provide that contribution to damage "does not automatically release the wrongdoing State from its obligation to make full reparation" (A/CN.4/492, p. 14).

[417] A/CN.4/488, p. 105 (italics in the original).

injured State "might in some circumstances be under a duty to mitigate its damages, analogous to the rules of contract law".[418] France suggests that paragraph (2) (b) should be limited to the case of diplomatic protection and should thus read "a national of the State exercising diplomatic protection".[419]

221. It may be admitted that article 42 (2) has some element of progressive development, especially in the context of State-to-State obligations (as distinct from diplomatic protection). On the other hand, it is reasonable that the conduct of the injured State be taken into account in assessing the form and extent of reparation due, and in practice it is taken into account in a variety of ways. The Special Rapporteur proposes that the paragraph be maintained as a separate article dealing with mitigation of responsibility. That title would help to allay the fears expressed by one government that the conduct of the victim could negate the responsibility of the perpetrator entirely. The only situation in which this would be so would be where the loss in question could not be attributed at all to the conduct of the responsible State but was entirely due to the intervening act of the "victim", or of a third party. That situation can occur, but it is covered by the general requirement of proximate cause and not by the present provision.

(b) Mitigation of damage

222. A related issue, already briefly discussed,[420] is the so-called duty of an injured State to mitigate its damage. As the International Court pointed out in the *Case concerning the Gabcikovo-Nagymaros Project*, this is not an independent obligation but a limit on the damages which the injured State could otherwise claim.[421] Although related to the notion of "contributory negligence" or "comparative fault", it is analytically a distinct idea: it is not that the injured party contributes to the damage, rather than measures reasonably available to it which would have reduced the damage were not taken. Especially given concerns about limiting to a reasonable extent the burden of reparation,[422] such a principle should also be included in the proposed article.

7. Summary of conclusions as to Part 2, Chapter II

223. For these reasons, Chapter II of Part Two should be formulated as follows.

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[418] *Ibid.* (footnote 70).

[419] *Ibid.*, p. 103.

[420] Above, paragraph 30.

[421] *I.C.J. Reports* 1997 p. 7 at p. 55 (para. 80), cited in paragraph 30 above.

[422] See above, paragraph 161.

Chapter II. The Forms of Reparation

Article 43

Restitution

A State which has committed an internationally wrongful act is obliged to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) is not materially impossible; ...

(c) would not involve a burden out of all proportion to the benefit which those injured by the act would gain from obtaining restitution instead of compensation.

Article 44

Compensation

A State which has committed an internationally wrongful act is obliged to compensate for any economically assessable damage caused thereby, to the extent that such damage is not made good by restitution.

Article 45

Satisfaction

1. The State which has committed an internationally wrongful act is obliged to offer satisfaction for any non-material injury occasioned by that act.

2. In the first place, satisfaction should take the form of an acknowledgement of the breach, accompanied, as appropriate, by an expression of regret or a formal apology.

3. In addition, where circumstances so require, satisfaction may take such additional forms as are appropriate to ensure full reparation, including, *inter alia*:

[(a) nominal damages;]

(b) damages reflecting the gravity of the injury;

(c) where the breach arose from the serious misconduct of officials or from the criminal conduct of any person, disciplinary or penal action against those responsible.

4. Satisfaction must be proportionate to the injury in question and should not take a form humiliating to the responsible State.

Article 45 bis

Interest

1. Interest on any principal sum payable under these draft articles shall also be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be those most suitable to achieve that result.

2. Unless otherwise agreed or decided, interest runs from the date when compensation should have been paid until the date the obligation to pay compensation is satisfied.

Article 46 bis

Mitigation of responsibility

In determining the form and extent of reparation, account shall be taken of:

(a) the negligence or the wilful act or omission of any State, person or entity on whose behalf the claim is brought and which contributed to the damage;

(b) whether the injured party has taken measures reasonably available to it to mitigate the damage.